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SOFT AND HARD STRATEGIES: THE ROLE OF BUSINESS IN THE CRAFTING OF INTERNATIONAL COMMERCIAL LAW

*Susan Block-Lieb**

What motivates the choice between hard and soft law in the drafting of international commercial law, and what role does business play in the preference between the two?¹ Broad disagreement exists in international relations (“IR”) and international law (“IL”) commentary as to motivations for reliance on soft international law. Traditionally, this commentary casts a wide gaze across efforts to draft both international public and private law. This Article instead argues that narrowing the focus of the conversation to consider only international commercial lawmaking sharpens the debate about the use of hard and soft law. In the past, this debate focused only on states’ interests in crafting international law. Shifting the conversation to look specifically at international commercial lawmaking invites examination of the involvement of both public and private actors. It particularly invites examination of the “mechanisms, extent and effect” of participation by private commercial actors—businesses, financial institutions, and the international associations that represent their interests—in this process.²

IR and IL literatures mostly distinguish between hard and soft international law along three dimensions—obligation, precision, and delegation—

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1. I use the phrase “international commercial law” in this Article to refer to a subset of international private law governing commercial transactions involving trade in goods and services, including the law governing the transport of such goods and the payment and financing for the payment of such goods. The phrase is sometimes used to cover the law governing a broader range of financial transactions than those dedicated to the purchase of goods; it is also mostly limited to transactions between businesses and thus excludes consumer protection laws. I do not look to resolve either ambiguity in this Article. This cluster of issues currently engages the lawmaking efforts of several global lawmakers: the United Nations Commission on International Trade Law (“UNCITRAL”), the International Institute for the Unification of Private Law (which refers to itself as “UNIDROIT”), and the Hague Conference on Private International Law. For deeper analysis of these international organizations and their lawmaking efforts, see SUSAN BLOCK-LIEB & TERENCE C. HALLIDAY, *GLOBAL LAWMAKERS: INTERNATIONAL ORGANIZATIONS IN THE CRAFTING OF GLOBAL MARKETS* (2017). This usage modernizes the phrase “trade law” initially used by UNCITRAL. *Id.* at 1 n.1.

2. For a similar inquiry into the role of businesses, albeit their role in the making of multilateral treaties—that is, “hard” international laws, see Melissa J. Durkee, *The Business of Treaties*, 63 UCLA L. REV. 264 (2016).

that, together, describe the concept of legalization.³ In this context, “obligation” asks whether states are bound to a rule such that a failure of compliance would subject them to scrutiny under the rules and procedures of international law;⁴ “precision” means that the “rules unambiguously define the conduct they authorize, require or proscribe[;]”⁵ “[d]elegation” refers to the notion that the states obligated under such precise rules have also agreed to be bound to some dispute mechanism granted authority to implement, interpret, and apply those rules.⁶ An international obligation is said to be cast in “hard” law, therefore, if there is no wiggle room either in terms of *whether* a state is bound by a clearly articulated obligation or in terms of *how* states can be made to carry out such obligations. In contrast, international legislation is described as “soft” either if it is imprecise, imposes no obligation, or fails to specify how these precise obligations can be enforced against non-compliant states. How to enforce international legislation is the difficult part: if states are sovereign, then, by definition, they cannot be made to do anything they do not want to do.

On the basis of this definition, different schools of thought take issue with different aspects of soft law. Positive legal scholars like Prosper Weil and Jan Klabbers have little use for soft law, viewing it as “destabiliz[ing],”⁷ “detrimental,”⁸ or, at the very least, logically flawed.⁹ Rational institutionalists differ. They see a realist’s logic to non-binding soft laws, emphasizing that soft international law permits states to identify and signal their interests for international actors and perhaps lay out the possibility for future commitments.¹⁰ Andrew Guzman, for example, argues that states rationally

3. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421 (2000) (developing the concept of “legalization” in distinguishing between hard and soft international law); *see also* Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401 (2000) (expanding upon the definition of “legalization”); Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE 21, 30 (Dinah Shelton ed., 2000) (adopting a similar six factor test for soft/hard law).

4. David M. Trubek et al., ‘Soft Law’, ‘Hard Law’, and EU Integration, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 65, 69 (Gráinne de Búrca & Joanne Scott eds., 2006).

5. Abbott et al., *supra* note 3, at 401 (italicization omitted).

6. Trubek et al., *supra* note 4, at 69–70.

7. *See* Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 423 (1983).

8. Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT’L L. 381, 383 (1998).

9. Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complementments, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 713 (2010) (describing positive legal scholars as viewing soft international law as “logically flawed” and citing Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT’L L. 167, 181 (1996) (advocating retention of the “traditional binary conception of law”)).

10. *See* Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT’L ORG. 495, 508–13 (1991) (referring to “binding” international law as a “misleading hyperbo-

choose soft law to minimize the reputational costs that may result from a potential violation of law, whether due to uncertainty or otherwise.¹¹ Without being constrained by some enforceable international commitment, these commentators argue, a rational state may announce its interests through soft law formats that are intended more to communicate preferences and intentions than to establish enforceable commitments; a state's decision to format its statement of intentions in the form of a treaty is, say rationalists, a way for nations to signal their relative seriousness about a topic.

By contrast, constructivists like David Trubek focus less on the drafting and enforcement of an international agreement and more on its implementation.¹² Constructivists' sociological perspective on soft international law addresses "the gap between the law-in-the-books and the law-in-action" and emphasizes soft law's impact on states' behavior rather than states' obligations.¹³ Pragmatists like Gregory Shaffer and Mark Pollack similarly take a long view when considering the benefits of soft laws.¹⁴ They argue that "actors, working *ex ante*, use agreements having different characteristics to further particular aims."¹⁵ They also emphasize that "[t]hese different types of agreements can have unpredicted effects, *ex post*, leading to new cycles of international lawmaking."¹⁶ This focus on the recursive cycles of

le." But, describing the usage of "binding" as one that matters since it signals a nation's willingness to commit reputational capital to an international agreement).

11. Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 582 (2005) [hereinafter, Guzman, *Design*]; see also ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 71–111 (2008) (arguing that, when states enter agreements, they want their promises to be credible).

12. See Trubek et al., *supra* note 4, at 75 (distinguishing rationalist and constructivist scholars' perspectives on soft law and finding that "constructivist scholars look at how institutions facilitate constitutive processes such as persuasion, learning, argumentation, and socialisation").

13. Shaffer & Pollack, *supra* note 9, at 713 (describing constructivist schools of thought); see also Trubek et al., *supra* note 4, at 75 (same, specifically as relates to European lawmaking).

14. See Shaffer & Pollack, *D* note 9, at 728 ("examin[ing] the problem of implementing international agreements, [and] arguing that implementation challenges set off recursive cycles of international lawmaking, with hard and soft law sometimes being used as complements and sometimes as antagonists.").

15. Shaffer & Pollack, *supra* note 9, at 714.

16. Shaffer & Pollack, *supra* note 9, at 714. Shaffer and Pollack's reference to the long view in theories of international law harkens to Carruthers and Halliday's theory of recursivity. Shaffer & Pollack, *supra* note 9, at 742–43; see also TERENCE C. HALLIDAY & BRUCE G. CARRUTHERS, *BANKRUPT* (2009) (relying on recursivity theory in describing international efforts to set corporate insolvency law standards in the wake of the Asian Financial Crisis); BRUCE G. CARRUTHERS & TERENCE C. HALLIDAY, *RESCUING BUSINESS: THE MAKING OF CORPORATE BANKRUPTCY LAW IN ENGLAND AND THE UNITED STATES* (1998) (same). In subsequent work, Halliday and Shaffer together elaborate on the influence of recursivity in the making of what they refer to as "transnational legal orders"—also referred to as "TLOs." For an extensive definition of a TLO, see *TRANSNATIONAL LEGAL ORDERS*, ch. 1, at 31–34 (Terence C. Halliday & Gregory Shaffer eds., 2016). Halliday and I also write about recursivity

lawmaking also led Halliday and me to argue that soft laws are often part of an incremental strategy of soft law implementation in which hard laws may follow the enactment of soft laws and that states may weave soft and hard laws together to broaden the reach of lawmaking initiatives.¹⁷

Most of the existing IR and IL commentary—from positivists, rational institutionalists, and constructivists—focuses exclusively on a state-centered set of contentions. It focuses on states' interests in soft law for international coordination and leaves out any question of private interests in the promulgation of soft international law. Although this analysis is widely applied to a variety of international and transnational laws, whether public or private,¹⁸ this commentary mostly ignores businesses' interests in international lawmaking.¹⁹

The focus on states' interests in the choice between soft and hard international law is not surprising: for over one hundred years, conventional IL theory has asserted that international law is made wholly by states negotiating in their own national interests and that businesses influence states' international lawmaking efforts only indirectly through domestic channels.²⁰ From this perspective, states may or may not incorporate these market interests made known to them through domestic channels; economic actors are viewed as helpless to press their case in international settings.

and TLO theory in our book, *GLOBAL LAWMAKERS*. See BLOCK-LIEB & HALLIDAY, *supra* note 1, at 23–31.

17. Susan Block-Lieb & Terence C. Halliday, *Incrementalisms and Global Lawmaking*, 32 *BROOK. J. INT'L L.* 851, 854 n.9 (2007).

18. See, e.g., Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 *J. LEGAL ANALYSIS* 171, 172 (2010) (“Language included in the Universal Declaration of Human Rights, the Helsinki Final Act, the Basle Accord on Capital Adequacy, decisions of the UN Human Rights Committee, and rulings of the International Court of Justice (ICJ), are thought to impact states because of their quasi-legal character.”); Shaffer & Pollack, *supra* note 9, at 752–65, 790–98 (drawing examples from WTO trade law, international laws governing genetically modified food, finance, environmental protection of biodiversity, human rights, and trade in cultural products).

19. For counterexamples of commentary focused on business' intervention in global lawmaking efforts, see, for example, BLOCK-LIEB & HALLIDAY, *supra* note 1; JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 27 (2000); Durkee, *supra* note 2; Melissa J. Durkee, *Persuasion Treaties*, 99 *VA. L. REV.* 63 (2013); Melissa J. Durkee, *International Lobbying Law*, 127 *YALE L.J.* 1742 (2018); Gregory C. Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 *CONN. L. REV.* 147, 172 (2009). For counterexamples of commentary focused on businesses' involvement in transnational private standard setting, see, for example, *NON-STATE ACTORS AS STANDARD SETTERS* (Anne Peters et al. eds. 2009).

20. 1 *L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE* 341 (1905) (“Since the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations.”); see also Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 *U. CHI. L. REV.* 469, 470–83 (2005) (surveying foundations of international legal theory, including the primacy of the state); *Developments in the Law: Extraterritoriality*, 124 *HARV. L. REV.* 1226, 1228 (2011) (tracing notion of the primacy of nation-states in international lawmaking to the Treaty of Westphalia in 1648).

Increasingly, however, this concentration on states as the only legitimate influence in the making of law, whether domestic or international, has been criticized as “an outdated theory.”²¹ Recent scholarship has begun to question the primacy of nation-states and their national interests in the making of international law.²² Some of this criticism is the result of empirical work demonstrating that the state-centric focus of conventional IL theory is either inaccurate or at least incomplete.²³ These empirical studies find that businesses influence IL indirectly at the domestic level, to be sure, but also more directly by accessing international organizations (“IOs”) and transnational regulatory networks (“TRNs”) both as observers and as participants in the lawmaking process.

In our book, Terence Halliday and I demonstrate broad involvement within the United Nations Commission on International Trade Law (“UNCITRAL”) by delegations of non-state actors.²⁴ Our observations involve three case studies within UNCITRAL (insolvency, secured transactions, and international transport law),²⁵ but others have studied non-state influences across a broader range of international lawmaking.²⁶ For example, John Braithwaith and Peter Drahos study thirteen areas of global business law and found that business actors invariably took leading roles in the formation of this law.²⁷ Based on two additional case studies (the Cape Town Convention on securing international interests in mobile equipment, like aircraft and rolling stock, and the Trans-Pacific Partnership, a free trade agreement), Melissa Durkee similarly contends that businesses “form transnational coalitions, address their concerns directly to international lawmakers who are not subject to domestic political checks, and assume lawmaking roles previously held only by states.”²⁸

21. Durkee, *supra* note 2, at 267.

22. See, e.g., BRAITHWAITE & DRAHOS, *supra* note 19, at 27 (2000) (widely studying global business regulation and concluding, among other things, that “[t]he most recurrently effective actors in enrolling the power of states and the power of the most potent international organization (e.g. the WTO and IMF) are large US corporations.”); Durkee, *supra* note 2 (studying the role of business actors in treaty formation generally and in particular in the case of the Trans-Pacific Partnership and Cape Town Convention); Shaffer, *supra* note 19, at 172 (concluding that “[b]usinesses play a critical role in international and transnational law, which has spread, directly or indirectly, to most regulatory areas.”).

23. Gregory Shaffer and Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1 (2012).

24. BLOCK-LIEB & HALIDAY, *supra* note 1.

25. *Id.* at 4–7, 96–150.

26. Durkee, *supra* note 2, at 266.

27. BRAITHWAITE AND DRAHOS, *supra* note 19.

28. Durkee, *supra* note 2, at 268. Unlike Halliday and I, who focus both on UNCITRAL’s hard and soft international law products, Durkee concentrates her analysis on the business of treaties—that is, the involvement of business actors in treaty negotiations and the effect of this participation in the content and the success or failure of this hard law. *Id.* at 287–88.

These empirical studies stand on the shoulders of earlier theoretical commentary that questions the notion that states, and states alone, are and should be involved in international lawmaking. This modern theory looks to account for sub-state and possibly non-state actors' involvement in the conceptualization, drafting, implementation, and enforcement of international legislation. International liberal theory, for example, studies the role of sub-national actors in international relations and international law.²⁹ Network and global legal pluralism theories focus on the influences of sub-national epistemic communities in international lawmaking.³⁰ The global administrative law project argues that both public and private actors have roles in the administration of international law and looks to account for the involvement of these sub-national and non-state actors.³¹ Transnational legal order theory also examines the involvement of state, sub-state, and non-state actors but expands this focus to actors located in international, national, or local contexts and broadly considers the alignment, settling, and institutionalization of legal texts among these fields.³² Market theories of private standard setting focus on non-state actors' involvement in transnational self-regulation

29. See, e.g., Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 513 (1997) (elaborating liberal theory in international relations; explaining that domestic constituencies construct state interests); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1961 (2002) (through international liberal theory, considering the role of sub-state and non-state actors in developing and implementing human rights treaties because the theory "opens the black box of the state."); Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 168–70 (1999) (viewing sovereign nations as agents of small interest groups and, thus, questioning the Westphalian model of IL); Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 502 (2004) (arguing that domestic interest groups sometimes attempt to set domestic policy and develop domestic law through international agreement).

30. For the classic work on network theory in international law ("IL"), see ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004). For that of global legal pluralism, see PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* (2012); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007). See also, e.g., Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603, 2656 (1997) (describing the influence of epistemic communities of government officials, NGOs, "transnational moral entrepreneurs[,] and business entities working transnationally to entrench patterns of behavior and generate norms to solidify these patterns).

31. See, e.g., Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 20 (2005) (discerning "[f]ive main types of globalized administrative regulation[,] other than treaty laws, including some "administration by private institutions with regulatory functions.").

32. See, e.g., TRANSNATIONAL LEGAL ORDERS 3 (Terence C. Halliday & Gregory Shaffer eds., 2015) (describing the aim of the transnational legal order theory as "reframing the study of law and society in today's world from a predominantly national context . . . to a perspective that places processes of local, national, international, and transnational public and private lawmaking and practice in dynamic tension within a single analytic frame.").

and standard setting more than states' involvement in international lawmaking per se³³ or international law more generally.³⁴

Although conventional analyses of hard and soft international law fail to account for the distinct goals of soft international law in private, commercial contexts, these commercial law contexts present an important locus of international law study.³⁵ Specifically, emphasis on international commercial law provides a basis for examining the role that business interests can and do play in producing and implementing hard and soft commercial laws and the special usefulness of soft international law to private, commercial entities.

This Article proceeds to fill these gaps in three steps. Part I returns to the classic definition of hard international law initially put forward by Kenneth Abbott and Duncan Snidal and related IR scholars and analyzes existing commercial law treaties in light of this definition. It concludes that virtually none of these commercial law treaties constitute "hard" international law because nearly all commercial law treaties rely on national courts for enforcement. But Abbott and Snidal's focus on the extent to which international law is legalized—and especially the extent to which it is enforced by international actors—may matter less with commercial than other more public international lawmaking. This is because the mostly private law governing commercial transactions conceives of obligation and enforcement in ways distinct from its public law counterparts.

Part II explains the distinction between private and public laws that govern purely domestic commerce. Many commercial transactions are not governed by regulatory legislation imposing "top down" obligations enforced by the state but rather contractual obligations that are self-regulating

33. See, e.g., NON-STATE ACTORS AS STANDARD SETTERS, *supra* note 19; KRISTINA TAMM HALLSTRÖM, ORGANIZING INTERNATIONAL STANDARDIZATION: ISO AND THE IASC IN QUEST OF AUTHORITY (2004); Panagiotis Delimatsis, *Global Standard-Setting 2.0: How the WTO Spotlights ISO and Impacts the Transnational Standard-Setting Process*, 28 DUKE J. COMP. & INT'L L. 273 (2018); Walter Mattli & Tim Büthe, *Setting International Standards: Technological Rationality or Primacy of Power?*, 56 WORLD POL. 1, 7 (2003).

34. See, e.g., Natasha Affolder, *The Market for Treaties*, 11 CHI. J. INT'L L. 159, 159 (2010) (observing that business entities rely on treaties for their private interests); Durkee, *supra* note 2, at 316–18 (analyzing the regulation of corporate participation in treaty making through the lens of both an administrative and market theory); NON-STATE ACTORS AS STANDARD SETTERS, *supra* note 19, at xix (edited volume providing "broad insight into the multifaceted world of standard setting by non-state actors."); Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1577 (2011) (noting the increased role of private actors, including multinational corporations and other businesses, in international lawmaking and exploring the possible effects of such participation).

35. Others have written on the distinct role that soft international law plays in regulating global financial institutions and financial markets. See, e.g., CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY* (2d ed. 2015); INTERNATIONAL INVESTMENT LAW AND SOFT LAW (Andrea K. Bjorklund & August Reinisch eds., 2012); THE CHANGING LANDSCAPE OF GLOBAL FINANCIAL GOVERNANCE AND THE ROLE OF SOFT LAW (Friedl Weiss & Armin J. Kammel eds., 2015). On the distinction between commercial, financial, and other sorts of economic law, see *supra* note 1.

and mostly self-enforcing. In the absence of mandatory commercial regulation, businesses assert their interests domestically through privately organized contracts and litigation brought to enforce these contracts as well as through political pressure for reform of judicial administration. Where regulation does exist or has been proposed, businesses may also look to influence this regulation by lobbying legislators and executives.

Part III considers the implications of commercial lawmaking for international settings and, in particular, state and non-state (that is, business) interests in the production of international versions of such laws.³⁶ State sovereignty interests vary depending on the type of international commercial law reform proposed, whether regulatory or otherwise; business' autonomy interests also vary along this axis. These interests may diverge,³⁷ although the interests of states and businesses are also interconnected and subject to change based on assertions of influence.³⁸ Soft law may aid in bridging these differences in various ways—through its gap-filling, advocacy, and socializing functions. Businesses are uniquely capable of fulfilling these functions through soft international law, capabilities that Part III explores both with reference to the detail of various international commercial laws and with regard to broader theoretical concerns.

I. INTERNATIONAL COMMERCIAL LAWS AND THEIR “LEGALIZATION”

Abbott and Snidal view only precise obligations subject to enforcement by an international court or other binding dispute resolution mechanism as sufficiently legalized to qualify as hard international law. Hardly any international agreements on topics of commercial law would satisfy Abbott and Snidal's test for hard law, specifically the aspect of their test regarding delegation and objectively certain enforcement of international treaties.³⁹ This

36. Soft law commentators mostly consider the role of soft international law in mitigating conflicts between states and thus as complementing or supplementing hard international laws. See, e.g., José E. Alvarez, *Reviewing the Use of “Soft Law” in Investment Arbitration*, 7.2 EURO. INT'L ARB. REV. 149 (2018); Guzman & Meyer, *supra* note 18; Guzman, *Design*, *supra* note 11; Shaffer & Pollack, *supra* note 9. Shaffer and Pollack have also written extensively on the potential for hard and soft international laws to interact as antagonists. See Shaffer & Pollack, *supra* note 9, at 743–52, and 788–98. When Shaffer and Pollack view this antagonism as between actors, they mostly talk in terms of states' interests diverging. *But see* Shaffer, *supra* note 19. In this Article, I too hold out the possibility that states hold divergent interests from business and other private participants in international lawmaking.

37. For a discussion of hard and soft law as antagonists, see Shaffer and Pollack, *supra* note 9, at 765–84, 788–98.

38. See *id.* at 722–27 (noting that soft law commentators focus more on the ways in which hard and soft law interact as complements).

39. As noted above, Kenneth Abbott and Duncan Snidal distinguish among harder or softer international instruments on the grounds of their “legalization”—that is, (i) the precision of the rules; (ii) the obligation they create for implementing states; and (iii) whether the rules delegate resolution of disputes arising under their terms to a third-party decisionmaker or enforcement agent. See *supra* note 3 and accompanying text.

is not because there is a dearth of commercial law treaties to have entered into force, however.

There are numerous longstanding private law treaties governing a wide range of procedural topics. The New York Convention (1958),⁴⁰ which governs enforcement of foreign arbitral awards, is a multilateral treaty that enjoys nearly unparalleled ratification by countries around the globe. The Hague Conference on Private International Law promulgated a number of treaties on topics that range from service of process, evidence, enforcement of choice of court clauses, and so on.⁴¹ In addition to this international commercial law governing procedural topics, there are more than a handful of treaties governing the substance of specific commercial transactions, such as the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, commonly referred to as the Hague Rules (1924),⁴² the United Nations Convention on Contracts for the International Sale of Goods, also known as the CISG (1978),⁴³ and the Convention on In-

40. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention].

41. The Hague Conference on Private International Law (sometimes referred to as “HCCH”) describes itself as “The World Organisation for Cross-Border Co-operation in Civil and Commercial Matters.” See HAGUE CONF. ON PRIV. INT’L L., <https://www.hcch.net/en/home> (last visited Apr. 8, 2019). Perusal of the international instruments it has promulgated over the past century clarifies that the term “matters” refers to litigation between private parties and that its core mission involves coordination of the procedural rules followed in such litigation. For a list of these instruments, see *Conventions, Protocols and Principles*, HAGUE CONF. ON PRIV. INT’L L., <https://www.hcch.net/en/instruments/conventions> (last visited Apr. 8, 2019).

42. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 187 [hereinafter Hague Rules]. Nearly one hundred years have passed since the Hague Rules entered into force, and enormous changes in the shipping industry have rendered many of its provisions outdated. See BLOCK-LIEB & HALLIDAY, *supra* note 1, at 99–100. As a result, states have sought to revise it, but treaty revision is exceedingly difficult with a treaty that has been agreed to as broadly as the Hague Rules have. The most successful of these revisions, the Visby Protocols, have been ratified by dozens of nations. For a discussion of the Visby Protocols, see BLOCK-LIEB & HALLIDAY, *supra* note 1, at 99–107. But dissension is widespread, especially among less economically developed nations. UNCITRAL sought to redress states’ concerns with the Hague Rules’ lack of modernity and carrier focus with its production of the Hamburg Rules in the late 1970s, and several states’ ratification of this draft treaty means that these too have entered into force. BLOCK-LIEB & HALLIDAY, *supra* note 1, at 100. Technical advances in the shipping industry and shifts in the economics of shipping prompted subsequent pressure for modernization of the Hague-Visby Rules with a new draft convention on international transport. BLOCK-LIEB & HALLIDAY, *supra* note 1, at 102–04. UNCITRAL recently promulgated its United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Dec. 11, 2008, http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/Rotterdam-Rules-E.pdf [hereinafter Rotterdam Rules]. Although roughly 20 countries signed this convention, only three ratified it. As a result, the Rotterdam Rules have not (yet?) entered into force. For a discussion of the Rotterdam Rules, see BLOCK-LIEB AND HALLIDAY, *supra* note 1, at 236–41.

43. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

ternational Interest in Mobile Equipment, known as the Cape Town Convention (2000).⁴⁴

All of these conventions, whether procedural or substantive, rely on national courts for their enforcement.⁴⁵ Without international provision for their enforcement, these conventions would not be sufficiently legalized to be considered hard law under the definition set out by Abbott and Snidal. Moreover, the CISG widely permits private parties otherwise subject to its terms to simply decide that they do not like its provisions and thus opt out by saying as much in their contracts. This kind of opt-out provision, sometimes also referred to as a default rule, while ordinary in some domestic law contexts, is unusual in international law and is highly controversial in some academic circles.⁴⁶ A convention that can be avoided through a contractual opt-out would hardly seem an “obligation” in the sense put forward by Abbott and Snidal. Moreover, nearly all of these treaties govern contractual relationships of one kind or another. As a result, the obligations that they impose are conditional on the conclusion of some initial private agreement.

International commercial law consists of more than just these “nearly hard” multilateral conventions. International organizations (“IOs”) have also widely promulgated non-binding legal texts concerning commercial and financial markets, mostly in the form of precisely drafted model laws or model legal provisions but also sometimes in the form of broad statements of principle offered to guide future legislation or regulation on a topic. States have implemented some of this soft international commercial law, for example, by enacting domestic legislation based on these international models or inspired by these principles.⁴⁷ Examples of this soft international law demonstrate the breadth of this range of commercial topics.

In our recent book, *Global Lawmakers*, Terence Halliday and I found that UNCITRAL has relied on soft law instruments since its inception in issue areas as varied as commercial dispute resolution, e-commerce, pro-

44. Convention on International Interests in Mobile Equipment, Nov. 16, 2001, T.I.A.S. No. 06-301.2, 2307 U.N.T.S. 285 [hereinafter Cape Town Convention].

45. See, e.g., Durkee, *Persuasion Treaties*, *supra* note 19. The Cape Town Convention (“CTC”) creates an international registry for international interests in mobile equipment, however. By internationalizing implementation of its mandatory rules and setting up this international registry, the Cape Town Convention may limit the grounds on which national courts can undermine enforcement of its mandates.

46. See generally Gilles Cuniberti, *Is the CISG Benefiting Anybody?*, 39 VAND. J. TRANSNAT’L L. 1511 (2006); Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 INT’L REV. L. & ECON. 446 (2005); Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT’L L. 743 (1999). The CISG is not unique in this regard. For example, the draft Rotterdam Rules would allow parties to enter into “volume contracts” that would not, based on such an agreement, otherwise be subjected to specified mandatory provisions in this draft convention once it enters into force. Rotterdam Rules, *supra* note 42, art. 80.

47. For collections of essays on these topics, see, for example, INTERNATIONAL INVESTMENT LAW AND SOFT LAW, *supra* note 35; THE CHANGING LANDSCAPE OF GLOBAL FINANCIAL GOVERNANCE AND THE ROLE OF SOFT LAW, *supra* note 35.

curement, project finance, insolvency, and secured transactions law.⁴⁸ We also found that, over its fifty-year history, UNCITRAL “invented” and adopted many types of soft law when drafting international standards, including: rules; model laws and model legal provisions; model contract provisions; recommendations; legal guides; notes; legislative guides; practice guides; and reports.⁴⁹

UNCITRAL is not unique in its reliance on soft international law on commercial and financial topics.⁵⁰ Although the International Institute for the Unification of Private Law (“UNIDROIT”) promulgated only draft conventions between its re-emergence after World War II and the 1990s, it has increasingly relied on soft law formats such as model laws and principles.⁵¹ The Hague Conference on Private International Law, which, until recently, worked exclusively on producing draft conventions and protocols, also promulgated a set of Principles on Choice of Law in International Commercial Contracts in 2015.⁵² The United Nations Conference on Trade and Development (“UNCTAD”) and other IOs that focus on reforming sovereign debt lending and restructuring practices have similarly published principles on responsible sovereign lending and borrowing,⁵³ although, in the past, UNCTAD legislative projects mostly centered on producing draft conventions.⁵⁴ The G-20, and the numerous lawmaking IOs and TRNs it relies on to build out its financial architecture project, have endorsed principles on a wide range of financial and economic issues.⁵⁵ Indeed, some commentators

48. BLOCK-LIEB & HALLIDAY, *supra* note 1, at 65–82.

49. BLOCK-LIEB & HALLIDAY, *supra* note 1, at 80–82.

50. See BLOCK-LIEB & HALLIDAY, *supra* note 1, at 80; Susan Block-Lieb & Terence Halliday, *Contracts and Private Law in the Emerging Ecology of International Lawmaking*, in CONTRACTUAL KNOWLEDGE: ONE HUNDRED YEARS OF LEGAL EXPERIMENTATION IN GLOBAL MARKETS 350 (Grégoire Mallard & Jérôme Sgard eds., 2016) [hereinafter Block-Lieb & Halliday, *Emerging Ecology*].

51. See Block-Lieb & Halliday, *Emerging Ecology*, *supra* note 50, at 352.

52. Block-Lieb & Halliday, *Emerging Ecology*, *supra* note 50, at 383.

53. ANNA GELPERN, HARD, SOFT, AND EMBEDDED: IMPLEMENTING PRINCIPLES ON PROMOTING RESPONSIBLE SOVEREIGN LENDING AND BORROWING (2012), https://unctad.org/en/PublicationsLibrary/gdsddf2012misc2_en.pdf (written for United Nations Conference on Trade and Development (“UNCTAD”)); MATTHIAS GOLDMANN, RESPONSIBLE SOVEREIGN LENDING AND BORROWING: THE VIEW FROM DOMESTIC JURISDICTIONS (2012), https://unctad.org/en/PublicationsLibrary/gdsddf2012misc3_en.pdf (a comparative survey written for UNCTAD); Juan Pablo Bohoslavsky & Matthias Goldmann, *An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law*, 41 YALE J. INT’L L. ONLINE 13, 23–26 (2016).

54. BLOCK-LIEB & HALLIDAY, *supra* note 1, at 377–80.

55. For a discussion of the G-20’s high-level principles on financial consumer protection, financial inclusion, financial education, and other topics, see Susan Block-Lieb, *Consumer Financial Protection, Inclusion, and Education: Connecting the Local to the Global*, in LAW BETWEEN BUILDINGS: EMERGING GLOBAL PERSPECTIVES IN URBAN LAW 82 (Nestor Davidson & Nisha Mistry eds., 2017). For a discussion of other aspects of the G-20’s financial architecture project, see, for example, BRUMMER, *supra* note 35; Sungjoon Cho & Claire R.

promote soft international law as preferable to hard law for addressing problems in international regulation of financial institutions and financial markets despite—and possibly because of—the fact that it is not enforceable.⁵⁶

That little international commercial law satisfies the test for legalization set out by Abbott and Snidal is hardly surprising. Domestic private laws, like many governing commercial transactions, are implemented and enforced differently than their domestic public law counterparts. While public laws set mandatory obligations, private laws may condition obligation on voluntary agreement of one sort or another. While mandatory public laws are mostly enforced by states, private laws are often self-enforcing, albeit with the assistance of state-sponsored courts.

None of this should be understood as an argument to disregard Abbott and Snidal and their focus on precisely stated, independently enforceable obligations when assessing international commercial law. But emphasizing and examining the distinctions between hard and soft international commercial laws assist in understanding that the role of open-ended, non-binding texts may hold distinct implications for commercial contexts, and particularly for the business actors to which they apply. These distinctions hold sovereignty and autonomy implications for the participants in national and transnational commercial lawmaking and for the implementation and enforcement of these laws once promulgated, as more fully discussed in the next two parts.

II. A TYPOLOGY OF DOMESTIC LAW GOVERNING COMMERCIAL CONDUCT

There are three distinct “models” of national laws governing the commercial conduct of private parties.⁵⁷ To keep them separate, I will refer to one as commercial regulation, another as commercial common law, and the third as a commercial code.

Kelly, *Promises and Perils of New Global Governance: A Case of the G-20*, 12 CHI. J. INT'L L. 491 (2012); Martin Gelter & Zehra G. Kavame Eroglu, *Whose Trojan Horse? The Dynamics of Resistance Against IFRS*, 36 U. PA. J. INT'L L. 89, 102–03 (2014). So far, clubs of nations like the G-20 and G-7 have produced “leaders’ declarations,” which endorse “high level principles” but nothing “harder.”

56. See BRUMMER, *supra* note 35, ch. 3 (exploring why “most agreements, rules and standards used for promulgation of international financial law [are] non-binding” but entered into solemnly and complied with by means of reputation sanctions, market discipline, and institutional disciplines and how the “dominant explanations” of “soft law effectiveness” fall short in explaining global financial markets).

57. The reference here to national commercial laws is meant only to distinguish between national and transnational versions of these laws and not to discount the importance of sub-national or local laws, such as state law in the United States. Moreover, while it may be possible to apply a similar typology to any sort of private law, not just that governing commercial conduct of private parties, I leave questions of the generalizability of this analysis for another time.

With commercial *regulation*, a government establishes obligations or restrictions on the commercial behavior of private actors through legislation. Commercial regulation involves mandates. It is mandatory because governments often direct regulation at conduct they look to change (either by limiting or prohibiting it).⁵⁸ These mandates constrain private parties' freedom to contract. Because regulation looks to alter behavior, strong governmental enforcement may be viewed as a necessary component to the regulatory scheme. Regulatory obligations are subject to enforcement (i) by government action,⁵⁹ (ii) by private action through government institutions, such as government-sponsored courts,⁶⁰ or (iii) through some combination of private and public action. Banking laws and regulations, for example, are enforced solely through public action;⁶¹ insolvency and intellectual property laws set mandatory rules but are enforced mostly through private action;⁶² the Sherman Antitrust Act and False Claims Act authorize both government and private enforcement of their mandates, although they especially incentivize *qui tam* and other private actions with the promise of treble damages if private law suits are successful.⁶³

58. There may be constitutional as well as purely political limitations on the breadth of conduct that the government can regulate.

59. Government enforcement varies in terms of the extent to which government actors possess and exercise jurisdiction to determine private actors' compliance with the mandates contained in regulation: more than simply require or prohibit conduct, regulation may specify *how* a regulated entity should comply with regulatory requirements. For example, governments may enforce regulatory mandates with threat of criminal or civil action, such as with securities regulations. They may assert visitatorial jurisdiction that claims complete access to the books and records of regulated entities, such as with bank regulations.

60. For a discussion of regulation enforced through private action, see, for example, Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012).

61. For a discussion of regulation enforced through a combination of public and private enforcement, see Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 18 (2010); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285 (2016); Prentiss Cox et al., *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37 (2018); Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911 (2017); see also Zachary D. Clopton, *Diagonal Public Enforcement*, 70 STAN. L. REV. 1077 (2018).

62. Bankruptcy and insolvency laws often either require or allow for the appointment of a trustee in bankruptcy ("TIB"). The TIB should be viewed as a quasi-public official and litigation brought by the trustee as a hybrid between public/private action. Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715 (2018). Intellectual property ("IP") laws usually either require or allow private parties to register these property interests in government sponsored registries. But ex post violations of IP laws are enforced (mostly) through private causes of action brought before government-sponsored courts, unless criminal violations of the law are asserted. John M. Golden, *Patent Privateers: Private Enforcement's Historical Survivors*, 26 HARV. J.L. & TECH. 545 (2013).

63. See, e.g., David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107

Government involvement with commercial *common law* is more attenuated and indirect than with commercial regulation. With commercial common law, private parties are mostly free to contract about their commercial interactions. Breach of these privately established obligations is subject to enforcement through (but not by) government institutions. Government-sponsored courts may be engaged in dispute resolution through their supervision of litigation (with the court's rationale in deciding a dispute recorded in publicly available decisions that can guide the future action of private parties) or by enforcing awards entered in privately conducted arbitration proceedings (although the decisions of an arbitrator are often not made publicly available and so are less likely to guide future conduct). In either case, however, these enforcement actions are initiated by private actors at private expense. Unlike regulation, which may trigger a wide range of public enforcement action by government actors—whether government regulators, investigators, or prosecutors—common law violations are self-enforcing through private action or not at all. I refer to this as commercial *common law* because, in common law countries, the decisions issued by courts to resolve private parties' disputes are, or at least act as, law. Arbitral decisions and privately negotiated contracts and other texts may similarly provide order for public parties, although these texts are not issued by governmental actors and may not be publicly available for review or guidance.

Commercial *codes* offer a third alternative. Commercial conduct is governed by a commercial or other code in civil law jurisdictions, but the term is used broadly here to also include statutes such as the Uniform Commercial Code, adopted in all fifty of the United States. As with commercial common law, private parties are mostly free to identify their own restrictions and set their own obligations in some private document, such as a contract, and states offer courts as a means for dispute resolution, whether directly through litigation or indirectly through enforcement of arbitral awards. Distinct from common law development, courts resolve contract disputes governed by commercial codes by following the logic set out in the code rather than that set out in earlier judicial decisions. Courts' reasoning may be made publicly available, but, depending on the jurisdiction, these published judicial decisions may have limited precedential effect; private parties may not be able to rely on these judicial decisions to guide their conduct and contracting. Instead, governments draft commercial legislation in codes to guide private parties in contracting and conducting their commercial affairs.

N.W. U. L. REV. 1689 (2013); David Kwok, *Evidence from the False Claims Act: Does Private Enforcement Attract Excessive Litigation?*, 42 PUB. CONT. L.J. 225 (2013) (assessing public and private enforcement of FCA); Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. REV. 315 (2011) (discussing the relative merits of public and private enforcement of antitrust laws); D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689 (2012).

Commercial codes may resemble regulation (as defined above) in that both are creatures of legislation. Nonetheless, unlike regulation, a code generally does not seek to alter private conduct. Instead, codes often aim merely to record conduct and custom and set out their findings in law-like form for all to access.⁶⁴ Neither commercial codes nor commercial common laws involve mandates in the same way that regulation does. Private parties are governed by codes or common laws because they opt in to this law through voluntary agreement and, depending on how these agreements are drafted, may opt out of default provisions in the law. In this way, it is often said that common law courts and codes both “find” rather than “make” law.

FIGURE 1: VARIETIES OF COMMERCIAL LAWS, AND THEIR IMPLICATIONS FOR SOVEREIGNTY AND PRIVATE PARTY AUTONOMY

	Domestic Law
Commercial Common Law	<ul style="list-style-type: none"> • Private parties (PPs) set obligations, e.g., through contract • Private obligations self-enforced by PPs, through government-sponsored, domestic courts <ul style="list-style-type: none"> ◦ Litigation → entry of judgment + enforcement of judgment; OR ◦ Enforcement of arbitral award • “Common law” created by judicial decision published <i>ex post</i>; courts “find” law by examining past practices and past precedent
Commercial Code	<ul style="list-style-type: none"> • State, through legislature, sets out PPs’ obligations in a code <ul style="list-style-type: none"> ◦ Legislatures “find” law through examining past practices • Private obligations self-enforced by PPs, through assistance of govt-sponsored, domestic courts <ul style="list-style-type: none"> ◦ Litigation → entry of judgment + enforcement of judgment; OR ◦ Enforcement of arbitral award • Code exists <i>ex ante</i>; PPs trigger these obligations through private arrangement, e.g., contract <ul style="list-style-type: none"> ◦ PPs may opt out of code provisions through contract
Commercial Regulation	<ul style="list-style-type: none"> • State, through legislature, sets out PPs’ obligations in regulation <ul style="list-style-type: none"> ◦ Regulations often set mandatory rules (no opt-out) ◦ Legislatures “make” regulatory law • State, through executive, may implement and enforce regulation <ul style="list-style-type: none"> ◦ Compliance ◦ Public litigation → entry of judgment + enforcement of judgment; OR ◦ Enforcement of arbitral award (if arbitral) • State may delegate some or all enforcement authority to PPs <ul style="list-style-type: none"> ◦ Private litigation → entry of judgment + enforcement of judgment; OR ◦ Enforcement of arbitral award (if arbitral)

64. In this way, commercial codes are often referred to as a “modern” *lex mercatoria*. See, e.g., Gilles Cuniberti, *Three Theories of Lex Mercatoria*, 52 COLUM. J. TRANSNAT’L L. 369 (2014); CLIVE M. SCHMITTHOFF, *The Unification of the Law of International Trade* (1968), in SELECT ESSAYS ON INTERNATIONAL TRADE LAW 206 (Chia-Jui Cheng ed., 1988).

Figure 1 summarizes this typology. It shows that government involvement in commercial *common law* is minimal, while government involvement in commercial *regulation* is substantial; government involvement in commercial *codes* sits between these two. States rely on courts simultaneously to enforce and create commercial common law. With commercial codes, states rely on legislatures to draft the codes and courts to enforce them. With regulation, states rely on legislatures to draft, executive agents to implement, and courts to enforce the regulations.

Figure 1 also informs understanding of businesses' influence on commercial law and legal ordering in a domestic context. Influence is generally described as the pressure that businesses exert on legislatures, regulators, and state executives. Where a commercial *code* or *regulation* exists or has been proposed at the national level, businesses may seek to affect the presence and content of the legislation and its enforcement through lobbying efforts. Lobbying is far less important with commercial *common law*, however, since, by definition, no legislation governs this law. The common law nonetheless presents alternative avenues for influencing its direction and the legal ordering of commerce. Here, businesses primarily assert their interests through privately organized contracts and litigation brought to enforce these contracts. If they are generally dissatisfied with the court system, they may also exert political pressure for reform of the rules governing procedure or judicial administration and possibly even of judges or juridical institutions. If dissatisfied with the substance of specific judicial rulings in a particular issue area, businesses may even push for legislation to overwrite the case law.

In sum, this Part distinguished between three types of domestic commercial law—commercial common laws, commercial codes, and commercial regulation—to clarify that, considered as a whole, commercial law involves both private and public interests. Part III, next, complicates this analysis to consider international commercial law. Unlike conventional international law analysis, which focuses on legal texts negotiated between states to regulate the (public) obligations sovereign states owe to each other, analysis of international commercial law requires consideration of both public and private obligations—that is, sovereign states' obligations owed as a result of an international treaty and the implications that states' obligations hold for commercial actors' obligations to each other, including their contracts and litigation choices.

III. INTERNATIONAL IMPLICATIONS: DISTINGUISHING SOVEREIGNTY AND AUTONOMY EFFECTS OF INTERNATIONAL COMMERCIAL LAWS

How do state and business interests interact in the production of international commercial law? Under what circumstances are states' sovereignty interests and business' autonomy interests consistent, and when do they diverge? How does this interaction of interests affect businesses that look to influence international commercial lawmaking, not just through domestic

channels but also in an international setting? And how has this interaction affected the choice between hard and soft law governing international commercial markets? Each of these questions is analyzed below.

As noted in Part II, there are three distinct “models” of national laws governing the commercial conduct of private parties: commercial common law, commercial codes, and commercial regulation. The same sovereignty and autonomy interests identified through this typology of domestic commercial laws assist in differentiating among the broad array of international commercial laws—some procedural, some substantive; some that are nearly hard, much that is very soft. The sections below first generally describe the sovereignty and autonomy interests involved in the making of international commercial laws. Sovereignty and autonomy interests vary with the type of commercial law involved, but there may be more issue-specific national and market interests at stake. Together these interests are applied to the list of international commercial laws set out in Part I.

A. *International Commercial Law and Its Implications for Sovereignty and Autonomy*

Part I identified two broad types of international commercial law treaties: procedural and substantive. Since the latter decades of the nineteenth century, jurists have viewed multilateral conventions on matters of procedure to be the most promising avenue for international agreement governing commercial transactions on the grounds that they were “apolitical,” or at least removed from the politics of substance.⁶⁵ Consistent with this expectation, more than several procedural treaties have entered into force, including the New York Convention on the enforcement of arbitral awards.⁶⁶ Like domestic commercial common laws, procedural treaties minimally affect states’ sovereignty interests. They bind domestic courts in specified ways but may not otherwise constrain states. Procedural treaties also lightly touch private, commercial parties’ autonomy interests. They limit some litigation practices but strengthen others by enabling the recognition and enforcement of foreign judgments; the substance of commercial rights and obligations is otherwise untouched by procedural treaties.

The existence of hard, or mostly-hard, procedural international law is, thus, explained to a large extent by an analysis of its limited intrusions on the sovereignty interests of states and the autonomy interests of private,

65. See, e.g., Ralf Michaels, *Globalizing Savigny? The State in Savigny’s Private International Law and the Challenge from Europeanization and Globalization*, in AKTUELLE FRAGEN ZU POLITISCHER UND RECHTLICHER STEUERUNG IM KONTEXT DER GLOBALISIERUNG 119, 124 n.21 (Michael Stolleis & Wolfgang Streeck eds., 2007), https://scholarship.law.duke.edu/faculty_scholarship/2812 (describing the “private international law” analysis of Story and Savigny as intentionally “apolitical.”); Daniela Caruso, *Private Law And State-Making in the Age of Globalization*, 39 N.Y.U. J. INT’L L. & POL. 1, 20 (2007) (same).

66. See New York Convention, *supra* note 40.

commercial actors. Treaties governing the enforcement of awards or judgments and other procedural matters encroach only, or at least mostly, on the judicial authority within a nation state. As a result, they intrude less on the sovereignty of ratifying countries than treaties governing substantive areas of law. Treaties on the recognition and enforcement of judgments also impinge lightly on the autonomy of the commercial actors located in these countries, especially where the treaty enforces choice of court and choice of law provisions in parties' contracts. International laws governing the enforceability of international arbitral awards are even less intrusive on sovereignty and autonomy interests given that treaties on arbitral enforcement are limited to a single, procedural issue and that the private parties whose disputes are governed by such treaties contractually agreed to arbitrate in the first place. Both sorts of international procedural laws mirror the logic of domestic commercial common law in that both sorts of commercial laws focus on the enforcement of the contracts between private, commercial actors.

And yet, broad agreement on a multilateral convention governing the recognition and enforcement of judgments has evaded international agreement, despite international consensus on the enforceability of arbitral awards. There is also a substantial body of soft international law on the procedures to be followed in litigating commercial claims before domestic courts and in international arbitration proceedings. The details of this hard and soft international law are discussed below with an eye to explaining the relative absence of hard law on the recognition of foreign judgments and presence of soft international laws on topics of commercial procedure.

There are also several treaties on topics of commercial law that extend beyond procedure and reach to substance. Two of these substantive commercial treaties govern topics that, under national law, would count as common law or a commercial code because they govern contracts of one form or another.⁶⁷ Another of these treaties is both regulatory and "code-like" in that private parties must first opt in to the contracts governing these international interests before its mandatory rules apply.⁶⁸

Once parties opt in to these international laws through contract, each of these substantive treaties constrains commercial actors' freedom to contract in specified ways, but these constraints are, in turn, limited. Only the *international* commercial transaction specified in the convention is implicated; purely domestic transactions continue to be governed by the relevant do-

67. These include contracts for the international sale of goods in the case of the CISG and contracts for the carriage of goods by sea in the case of the Hague-Visby Rules. Hague Rules, *supra* note 42; CISG, *supra* note 43.

68. Cape Town Convention, *supra* note 44. The Cape Town Convention is also at least "conditionally regulatory" in that the international interests it governs are valid and effective against non-parties to the contract on the basis of satisfying the registration requirements set out in the treaty and one of the appended protocols. See, e.g., Roy Goode, *Private Commercial Law Conventions and Public and Private International Law: The Radical Approach of the Cape Town Convention 2001 and Its Protocols*, 65 INT'L & COMP. L.Q. 523 (2016).

mestic law. In addition, contracting parties may opt out of one of these conventions—the CISG—through the simple expedient of choosing some other applicable law.⁶⁹

Because these substantive treaties are triggered by, and potentially limited by, private contracts, most of the obligations under them are borne by private parties. States' obligations under these substantive commercial law treaties are relatively limited: Domestic courts are obligated not to enter judgments inconsistent with the rules set out in the treaty once it is satisfied the treaty governs the transaction. Further, domestic legislatures are obligated not to produce laws inconsistent with the treaty provisions. Like other types of contracts, the contracts subject to these substantive commercial law treaties are self-enforcing.

The typology spelled out in Part II, above, assists in understanding why global lawmakers succeeded in promulgating these nearly-hard, code-like conventions, but—as with the explanation of international lawmaking on procedural matters—does not tell the full story. There is also a growing body of soft international law governing international contracts, including international contracts for the sale of goods, which gets detailed below. The purpose of this supplementary soft law on international contracts is similar to the soft international law on topics of commercial arbitration and conciliation—one complements the other by providing a gap-filling function.⁷⁰

Finally, international commercial law implicating national commercial regulation would create maximal imposition on state sovereignty. This is because a “regulatory” treaty would constrain three distinct aspects of sovereignty: a state's judiciary would be obligated to decide enforcement actions brought before it, whether by public or private parties, consistent with the rules set out in the treaty; its legislature could not enact legislation inconsistent with the treaty provisions; and its executive would be required to enforce treaty obligations in the same way as with obligations under domestic commercial regulation.

Not surprisingly, the only international commercial legislation that approaches a regulatory topic is insolvency law and possibly intellectual property law, depending upon the breadth of the definition of commercial law. If we expand the circle slightly to include both international commercial and financial laws and open up the possibility for consideration of regulations governing securities, capital markets, and financial institutions, we find additional international texts—but few if any international or multilateral conventions. On these topics, global lawmakers have produced hard interna-

69. CISG, *supra* note 43, art. 6.

70. See, e.g., Kenneth W. Abbott & Duncan Snidal, *Pathways to International Cooperation*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES* 51–53 (Eyal Benvenisti & Moshe Hirsch eds., 2004) (analyzing three “pathways to cooperation” through the interaction of hard and soft international law); Shaffer & Pollack, *supra* note 9, at 722–27, 733 (analyzing the range of IL and IR scholarship that views hard and soft international law as “complements”).

tional law only on the regulation of intellectual property with the TRIPS convention.⁷¹ International insolvency law⁷² and the international law governing banking, securities, and other financial regulatory topics are all formulated as soft law.⁷³

The lack of hard, or nearly-hard, international legislation on these regulatory topics is, thus, mostly explained by the breadth of the intrusions on the sovereignty of any country bound to such a mandate. Hard international law governing banking regulation or the regulation of capital markets would tread on all three “sovereign toes” in that domestic versions of these types of laws involve national legislation enforced by national regulators or other executives through national courts. Hard international law governing intellectual property or insolvency laws would not tread on national executives’ interests in regulatory enforcement to the same extent since these laws are mostly self-enforced by the private parties, but it would tread, in some way, on all three branches of national government. In addition, depending on how they are drafted, international commercial laws implicating national commercial regulations may constrain private parties’ freedom to contract, although these autonomous interests may already be severely limited by the governing domestic regulation. Moreover, because commercial regulation mostly sets mandates, private parties may not be able to opt out—regardless of whether such regulations impose international or national obligations.

A focus on the sovereignty and autonomy interests at risk with international commercial regulation may explain the absence of hard international laws on these regulated issue areas, but what explains the presence of soft international laws in substantive areas on which domestic regulation is commonplace, such as insolvency law or the regulation of financial institutions and financial and capital markets? Existing commentary posits complementary or antagonistic roles for soft laws layered with hard laws,⁷⁴ but these analyses do not explain stand-alone soft laws that neither bolster nor compete with pre-existing hard international law. This earlier commentary also focuses nearly exclusively on states’ interests, but our focus on international commercial law forces consideration of the interests of sub-national actors (such as regulators) and non-state actors (such as the businesses and transactions to which the soft law texts are directed). Puzzles remain regard-

71. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS].

72. UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, U.N. Sales No. E.05.V.10 (2005); UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW: PART THREE: TREATMENT OF ENTERPRISE GROUPS IN INSOLVENCY, U.N. Sales No. E.05.V.10 (2012); UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW: PART FOUR: DIRECTORS’ OBLIGATIONS IN THE PERIOD APPROACHING INSOLVENCY, U.N. Sales No. E.13.V.10 (2013).

73. See, e.g., *supra* note 55 (discussing the predominance of soft international law in this context).

74. See, e.g., Shaffer & Pollack, *supra* note 9, at 722–27, 788–98.

ing the extent of reliance on soft international law in these commercial contexts and the possible influence of business actors in this decisionmaking.

B. Digging into the Details

The next sections dig more deeply into the details of international commercial lawmaking, both in terms of business access to international arenas of lawmaking and to the implications of such access for the choice between hard and soft international commercial law. They first discuss international commercial laws governing procedural topics (enforcement of arbitration awards; enforcement of judgments; enforcement of choice of court and choice of law clauses) and then proceed to substantive commercial code treaties (international sale of goods; international transport; international interests in moveable equipment) and international commercial regulation (insolvency and financial markets).

1. Arbitration and Dispute Resolution

The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards was first signed in 1958, quickly entered into effect in 1959, and currently enjoys ratification by an impressive 159 countries.⁷⁵ The scope of the New York Convention is fairly limited.⁷⁶ It governs only the recognition and enforcement of foreign arbitral awards. It does not govern the conduct of arbitration proceedings,⁷⁷ nor does it reach the recognition or enforcement of settlements arising out of other dispute mechanisms, such as conciliation or mediation.⁷⁸ Although the New York Convention is not ex-

75. New York Convention, *supra* note 40. For a list of the countries acceding to the terms of the New York Convention, see *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NATIONS, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en (last visited Mar. 20, 2019).

76. Although there are about 15 articles in the convention, the bulk of its mandates are found in article III. It provides that “each Contracting State shall recognize [transnational or international] arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, . . .” New York Convention, *supra* note 40, art. III; *see also id.* art. I (defining the scope of the treaty as applying to “arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought,”); *id.* art. V (specifying several exceptions to such recognition and enforcement).

77. *See* New York Convention, *supra* note 40, art. V, ¶ 1(a)–(e). *But see UNCITRAL Arbitration Rules*, U.N. COMMISSION ON INT’L TRADE L., <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration> (last visited Mar. 24, 2019); *UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments Adopted (2006)*, U.N. COMMISSION ON INT’L TRADE L., https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration (last visited Mar. 24, 2019).

78. *But see* United Nations Convention on International Settlement Agreements Resulting from Mediation, *to be opened for signature* Aug. 7, 2019, U.N. Doc. A/73/17, annex I; *UNCITRAL Conciliation Rules (1980)*, U.N. COMMISSION ON INT’L TRADE L., <https://uncitral.un.org/en/texts/arbitration/contractualtexts/conciliation> (last visited Mar. 24, 2019); *UNCITRAL Model Law on International Commercial Mediation and International Set-*

pressly limited to the recognition of commercial arbitration awards, its primary purpose is historically viewed as the promotion of international trade and commercial transactions.⁷⁹

The 159 countries that are bound by the New York Convention, thus, have agreed to relatively small limitations on their sovereignty. Although the Convention refers to the obligations of “each Contracting State,” these obligations are centered on the courts of the Contracting States. The Convention imposes strong obligations on domestic courts to enforce and recognize transnational or international arbitral awards within its scope. But it does not limit domestic courts’ enforcement of domestic arbitral awards; nor does it limit the authority of domestic legislatures or other rulemaking bodies with jurisdiction over the enforcement of domestic arbitral awards. As such, the New York Convention steps on only one “toe” of a state’s sovereignty.

This limited encroachment on sovereignty accounts both for the willingness of so many states to accede to the international obligations set out in the Convention and for its biggest weakness. Criticism of the New York Convention mostly centers on complaints about national courts in countries bound to the New York Convention that purport to follow the convention but decline to enforce an arbitral award on grounds viewed as indefensible, mostly overbroad interpretations of the “public policy” exception to enforcement found in the Convention.⁸⁰ Since there is no international court with jurisdiction to review the “erroneous” decisions of “rogue” national courts, there is little that can be done about national courts’ overly broad readings of the Convention’s exceptions.⁸¹ This slippage is precisely the concern raised by Abbott and Snidal—unless international legislation is enforceable by an international court or dispute mechanism, its “obligations” may be undermined by national actors and enabled by national courts.

tlement Agreements Resulting from Mediation, 2018, U.N. COMMISSION ON INT’L TRADE L., https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation (last visited Mar. 24, 2019).

79. See, e.g., Allen Sultan, *The United Nations Arbitration Convention and United States Policy*, 53 AM. J. INT’L L. 807, 824 (1959) (reviewing the history of the preparation of the New York Convention and arguing that the United States should ratify it on the grounds that “the goals of international commercial arbitration do not vary from the general objectives of society—prosperity, security, human freedom, and justice.”).

80. See, e.g., Leon Trakman, *Domestic Courts Declining to Recognize and Enforce Foreign Arbitral Awards: A Comparative Reflection*, 6 CHINESE J. COMP. L. 174 (2018) (describing court decisions from the United States, China, and the Netherlands discussing the breadth of the “public policy exception” in the New York Convention).

81. Soft law provides some measure of redress, although an obviously unenforceable one. For an example of this sort of effort at moral suasion, see *Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Done in New York, 10 June 1958* (2006), U.N. COMMISSION ON INT’L TRADE L., https://uncitral.un.org/en/texts/arbitration/explanatorytexts/recommendations/foreign_arbitral_awards (last visited Mar. 24, 2019) [hereinafter *Recommendation*].

UNCITRAL⁸² has long supplemented its hard international law on the enforcement of commercial arbitral awards with soft law. Since as early as 1976, UNCITRAL promulgated a number of soft laws on the topic of commercial arbitration and conciliation: there are rules on arbitration, conciliation, and investor-state arbitration,⁸³ model laws on both commercial arbitration and commercial conciliation,⁸⁴ and further “explanatory texts,” such as texts it refers to as a Secretariat Guide, Notes, and Recommendations.⁸⁵

What can soft law accomplish in this context, when hard international laws have failed to button down the details of arbitration and conciliation? To a large extent, this soft law is directed to businesses’ influence in implementing the New York Convention. As noted above, the Convention is mostly silent on how foreign arbitration proceedings should be conducted, but the soft rules and model laws subsequently promulgated by UNCITRAL fill in these gaps. UNCITRAL’s Arbitration Rules are explicitly directed at private parties, and they set out best practices associated with the conduct of

82. Recently, UNCITRAL expanded the scope of its multilateral conventions to include a broader range of dispute resolution. It has “hardened” its soft law on conciliation/mediation and produced a draft treaty on aspects of this topic. See United Nations Convention on International Settlement Agreements Resulting from Mediation, *supra* note 78. It has also begun to extend the reach of its arbitration treaties beyond commercial arbitration to include investor-state arbitration. See United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, Dec. 10, 2014, <http://www.uncitral.org/pdf/english/texts/transparency-convention/Transparency-Convention-e.pdf>. The Mauritius Convention has been signed by 22 countries; although so far only 5 countries have fully ratified this convention, it has entered into effect. 3. *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, UN TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22 (last visited Apr. 4, 2019). Investor-state arbitration is distinct from commercial arbitration in that the latter involves the effectuation of a purely private agreement to arbitrate, while the former concerns arbitration between a private investor and a public actor, whether the state itself or some state-sponsored entity. For a discussion of UNCITRAL’s work on investor-state arbitration, see, for example, Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. J. INT’L L. 410 (2018); Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT’L L. 361 (2018). Because investor-state arbitration involves arbitration between both public and private parties, I leave discussion of this debate for another day.

83. See United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, *supra* note 82; UNCITRAL Arbitration Rules, *supra* note 77; UNCITRAL Conciliation Rules (1980), *supra* note 78.

84. See UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments Adopted (2006), *supra* note 77; UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018), *supra* note 78.

85. See, e.g., *Recommendations to Assist Arbitral Institutions and Other Interested Bodies with Regard to Arbitrations Under the UNCITRAL Arbitration Rules (1976)*, U.N. COMMISSION ON INT’L TRADE L., https://uncitral.un.org/en/texts/arbitration/explanatorytexts/recommendations/arbitration_rules_interested_bodies (last visited Mar. 24, 2019); *Recommendation*, *supra* note 81.

foreign arbitration and conciliation proceedings.⁸⁶ Its Model Law on Commercial Arbitration is directed at domestic legislatures and fulfills a similar gap-filling function.⁸⁷

Supplementary or “gap-filling” soft law is more than non-binding international texts that pick up where the language of a related convention left off. Soft law on commercial arbitration, although non-binding, can influence private parties’ behaviors in multiple, specific ways. Parties, aware of the standards set out in the UNCITRAL rules, can specify in their arbitration or conciliation agreements that proceedings should comply with those standards set out in the rules. These parties can refer to UNCITRAL’s Arbitration Rules when seeking judicial recognition and enforcement of an arbitral award. They can seek enforcement in jurisdictions where the national courts have in the past looked to such rules for guidance. Moreover, parties can commit, contractually, to situate eventual arbitration proceedings in states that have enacted legislation to implement UNCITRAL’s Model Law on Commercial Arbitration. They can also decide against choosing to arbitrate in a jurisdiction that has declined to enact legislation to implement this model law.⁸⁸

Soft laws on arbitration procedures are directed toward this private behavior, often explicitly.⁸⁹ The role of business actors and other private parties in influencing the conduct of international arbitration proceedings involves the practices followed in arbitrations and in the contractual provisions that govern these practices.⁹⁰ In the absence of soft law on the topic, these arbitration practices would be uncoordinated and, thus, less concentrated an influence. UNCITRAL’s soft laws signal both to litigants in private arbitrations and to the international arbitrators to which these litigants direct their argument how to conduct proceedings to maximize enforcement of foreign arbitral awards under the New York Convention.⁹¹

Given the focus and effect of this soft law on the conduct of private action, the involvement of private, commercial actors in the preparation of these soft law texts might be viewed as both to be expected and consistent with the legitimacy of the resulting soft law text. Private actors’ involvement in the drafting of UNCITRAL’s Arbitration Rules is evident on the

86. In its website, UNCITRAL describes the Arbitration Rules as a “comprehensive set of procedural rules” that “cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.” *UNCITRAL Arbitration Rules*, *supra* note 77.

87. As a model law, and so directed toward domestic legislatures, UNCITRAL’s Model Law on Commercial Arbitration also fulfills an advocacy function.

88. Thanks are owed to Susan Franck for this point.

89. *UNCITRAL Arbitration Rules*, *supra* note 77, art. 1(1).

90. For an argument that these practices themselves constitute a sort of soft law, see Alvarez, *supra* note 36.

91. Cf. Guzman & Meyer, *supra* note 18, at 118 (referring to coordinating effects of soft law but viewing this coordination as between states rather than as between private actors).

face of this text,⁹² and in their attendance at the annual meeting of UNCITRAL's governing commission to ratify the Rules.⁹³ While the Rules are directed predominantly at the conduct of private parties, UNCITRAL's Model Law on Commercial Arbitration is instead directed to domestic legislatures. State delegations were more involved in the drafting of the Model Law than the Rules, but businesses' involvement was strong in both contexts. The working group charged with drafting UNCITRAL's Model Law on Commercial Arbitration included observers from international associations involved directly and indirectly with the conduct of such proceedings.⁹⁴

2. Recognition and Enforcement of Other Types of Awards or Judgments

If hard, or mostly-hard, international law on the enforcement of arbitral awards has commanded the agreement of so many countries, what about the enforcement of judgments entered by domestic courts when involved in transnational litigation? International laws on this topic should also be relatively easy to garner acceptance since they should involve a similarly limited encroachment on national sovereignty.

International and transnational organizations and similar actors have viewed international procedural agreements as low-hanging fruit since the late nineteenth century, when the first session of the Hague Conference on Private International Law was convened.⁹⁵ Optimism about the likelihood of reaching international consensus on topics of procedure has been mostly overblown.⁹⁶ The Hague Conference has long promulgated conventions on

92. See U.N. Secretary-General, *Rep. on the Revised Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade (UNCITRAL Arbitration Rules)*, U.N. Doc. A/CN.9/112 (1975), reprinted in [1976] 7 Y.B. COMM'N ON INT'L TRADE L. 157, U.N. Doc. A/CN.9/SER.A/1976 (describing the process through which the Arbitration Rules were produced and referring to a handful of expert academics who worked without the assistance of member state delegations or a working group).

93. Comm'n on Int'l Trade Law, Rep. on Its Ninth Session, U.N. Doc. A/31/17 (1976), reprinted in [1976] 7 Y.B. COMM'N ON INT'L TRADE L. 157, U.N. Doc. A/CN.9/SER.A/1976 (included among the NGOs that attended the Commission's annual meeting in 1976: Inter-American Commercial Arbitration Commission; International Chamber of Commerce; International Council for Commercial Arbitration; International Law Association).

94. See, e.g., Comm'n on Int'l Trade Law, *Rep. of Working Group on Arbitration and Conciliation on its Forty-Fifth Session*, U.N. Doc. A/CN.9/614 (2006) (included among the NGOs listed as attending its working group session: "Forum for International Commercial Arbitration (FICA), International Arbitration Institute (IAI), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA)").

95. See, e.g., HAROLD C. GUTTERIDGE, *THE CODIFICATION OF PRIVATE INTERNATIONAL LAW* (1951) (discussing the pros and cons of PIL conventions versus codification efforts aimed at unifying private laws).

96. See HAROLD C. GUTTERIDGE, *COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF THE STUDY OF LAW* 41–60 (1946) (noting that international

various aspects of international procedural law. International convergence mostly focuses on recognition of procedural aspects of litigation to protect the interests of children, as well as general procedural issues such as document recognition, evidence, and service of process.⁹⁷ The Hague Conference has also promulgated a convention on recognition of choice of court provisions in commercial agreements.⁹⁸ It has not succeeded more generally, however, in finalizing a convention on the recognition and enforcement of judgments.⁹⁹

Transnational and regional agreements on the recognition and enforcement of judgments have been far more successful than broad international agreements. Nearly every country in Europe is bound in some way to either the Brussels and Rome Conventions¹⁰⁰ or to the more recent EU Directives on these topics.¹⁰¹ These transnational agreements mostly center on judg-

agreement on procedural topics of “private international law” has not been reached because these subjects are not as apolitical as some had thought).

97. See, e.g., *Conventions, Protocols and Principles*, *supra* note 41 (listing the conventions and other international instruments promulgated by the Hague Conference on Private International Law). The Hague Conference also acts as the depository of record for these conventions in order to keep track of their entry into force and the countries bound to them. For a copy of “a full status report . . . showing the dates of signatures, ratifications, accessions and entry into force; the texts of declarations and reservations; the territorial units to which the Convention has been extended; the acceptances of accessions; the authorities designated,” see *Status Chart*, HAGUE CONF. ON PRIV. INT’L L., <https://www.hcch.net/en/instruments/status-charts> (last visited Apr. 8, 2019).

98. See *Convention on Choice of Court Agreements*, June 30, 2005, 44 I.L.M. 1294. Although this choice of court treaty has entered into effect, only 32 countries are bound to its terms. See *Convention of 30 June 2005 on Choice of Court Agreements*, HAGUE CONF. ON PRIV. INT’L L., <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (last visited Apr. 8, 2019). This number is far fewer than those party to the New York Convention, but the Choice of Court Convention is far younger than the New York Convention. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *supra* note 75 (159 parties to the New York Convention).

99. This is not for lack of trying. The Hague Conference has worked on its “Judgments Project” since at least 1992. See *The Judgments Project*, HAGUE CONF. ON PRIV. INT’L L., <https://www.hcch.net/en/projects/legislative-projects/judgments> (last visited Apr. 8, 2019).

100. Recognition and enforcement of judgments in civil and commercial cases was originally governed within the European Economic Community by the 1968 Brussels Convention. See *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, Sep. 27, 1968, <https://curia.europa.eu/common/reedoc/convention/en/c-textes/brux-idx.htm> (EC). The Brussels Convention has been replaced by the *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 2007 O.J. (L 339) 1. The Brussels Convention is often discussed in conjunction with the 1980 Rome Convention on the Law Applicable to Contractual Obligations, 1998 O.J. (C 27) 2. See *generally* CROSS-BORDER LITIGATION IN EUROPE (Paul Beaumont et al. eds., 2017) (providing an extensive analysis of the Brussels and Rome Conventions).

101. Both the Brussels and Rome Conventions have been superseded within the EU by a series of regulations. See Council Regulation (EU) No. 44/2001 of 22 Dec. 2000, O.J. (L 12) 1 (the first Brussels regulation) [hereinafter Brussels I]; Council Regulation (EC) No. 1215/2012 of 12 Dec. 2012, O.J. (L 351) 1 (the recast Brussels regulation, repealing Brussels I) [hereinafter Brussels II]; Council Regulation (EC) No. 593/2008 of 17 June 2008, O.J. (L

ments entered in commercial and civil proceedings rather than other types of proceedings.¹⁰² Broad exceptions are carved out from these European agreements¹⁰³ (for example, insolvency and bankruptcy proceedings are not covered by the Brussels Regime¹⁰⁴), although other European directives were later adopted to fill in some of these gaps (for example, the EU Directive on Cross-Border Insolvency).¹⁰⁵

Regional agreement on the recognition and enforcement of judgments have succeeded where broader *international* agreement has not, partly because these regional agreements are—to state the obvious—more limited in geographical scope. Countries are simply more willing to enter into commitments to enforce foreign judgments when they understand more about the courts whose judgments they are committing to recognize and enforce. Comprehension of the consequences of an international agreement on matters of procedure can be clarified and contained where commitments of recognition and enforcement are coupled with agreements on which country's courts will have jurisdiction over a particular matter and which country's law will govern the dispute brought before such a court.¹⁰⁶ However, these sorts of “triple” private international law (“PIL”) treaties are hard to achieve on an international, rather than simply a regional, basis. They involve three times as many topics to comprehend before agreeing to sign on and three times as many encroachments to the sovereignty of the signing countries.¹⁰⁷ These “triple” PIL treaties govern not only (i) the receiving court's obligation to recognize and enforce a foreign judgment, but also (ii) the jurisdictional reach of the court that entered that judgment and (iii) the

177) 6 (the first Rome regulation concerning the law applicable to contractual obligations) [hereinafter Rome I]; see also Council Regulation (EC) No. 864/2007 of 11 July 2007, O.J. (L 199) 40 (regulation applicable to non-contractual obligations, related to Rome I, and often referred to as Rome II).

102. See Brussels I, *supra* note 101, at pmb., ¶ 7 (noting that it broadly reaches “all the main civil and commercial matters apart from certain well-defined matters”); Brussels II, *supra* note 101, at pmb., ¶ 5.

103. Brussels I, *supra* note 101, art. 1, ¶ 1; Brussels II, *supra* note 101, art. 1, ¶ 1.

104. Brussels I, *supra* note 101, art. 1, ¶ 2(b); Brussels II, *supra* note 101, art. 1, ¶ 2(b) (both identically stating that the Regulation does not apply to “bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings”).

105. See Susan Block-Lieb, *Reaching to Restructure Across Borders (Without Over-Reaching), Even After Brexit*, 92 AM. BANKR. L.J. 1, 18–23 (2018) (discussing the EU Directive on Cross-Border Insolvency, both as initially drafted and as more recently recast, and its interaction with the Brussels and Rome Regulations).

106. For a discussion of shifts in emphasis among the traditional focus on jurisdiction, choice of law, and enforcement, see James Fawcett, *The Interrelationships of Jurisdiction and Choice of Law in Private International Law*, 44 CURRENT LEGAL PROBS. 39 (1991).

107. For a discussion of the Hague Conference's most recent work on enforcement of judgments, see *id.*

law applicable in the decisionmaking preceding entry of that judgment.¹⁰⁸ Bundling together international agreement on questions of jurisdiction and governing law make international obligations of recognition and enforcement more predictable and thus more palatable, but are harder to achieve.

European directives on enforcement and recognition of judgments are just this type of “triple” PIL: they tie transnational agreement on the recognition of judgment to commitments on jurisdiction and applicable law governing this litigation, as well as agreements to be bound to decisions of the Court of Justice of the European Union to construe these regional commitments.¹⁰⁹ The latter agreement ensures that European PIL treaties approach hard international law as defined by Abbott and Snidal, although these treaties (or, later, directives) are only transnational and not international in scope.

Draft conventions on the recognition and enforcement of judgments drafted by the Hague Conference are also framed as “triple” PIL treaties. However, states have been negotiating a version of the convention to require recognition and enforcement of civil judgements in commercial litigation for many years, without succeeding in finalizing any draft agreement. This debate may come to a head at the June 2019 meeting of the Hague Conference.¹¹⁰ Moreover, unlike European law on PIL, there have been no proposals to submit disputes over subsequent treaty interpretation to an international court. As a result, any international convention on the recognition and enforcement of judgments, whether put forward by the Hague Conference or not, would be subject to the same limitations as the New York Convention: it would be subject to the vagaries of national courts receiving requests for such enforcement.¹¹¹

Recently, this log jam may have begun to disassemble with tentative steps toward soft laws on these topics. The Hague Conference on Private International Law recently published its Principles on Choice of Law on In-

108. See Ronald A. Brand, *New Challenges in the Recognition and Enforcement of Judgments*, in *THE CONTINUING RELEVANCE OF PRIVATE INTERNATIONAL LAW AND ITS CHALLENGES* (Franco Ferrari & Diego P. Fernandez Arroyo eds., forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3246053 (“The private international law system has its own three pillars: jurisdiction, applicable law, and the recognition and enforcement of judgments.”).

109. Protocol on the Statute of the Court of Justice of the European Union, 2004 O.J. (C 310) 210. See Brand, *supra* note 108, at 15–24 (reviewing jurisdiction, applicable law, and judgment recognition under European law).

110. Brand, *supra* note 108, at 43–44 (referring to a Hague Conference draft Convention on the Recognition and Enforcement of Foreign Judgments scheduled for a diplomatic conference in June 2019, detailing the jurisdictional and other problems in this draft, and concluding that the negotiated result “is unlikely to work so well in a global convention subject to home-ward trend interpretations in each Contracting State”).

111. *Id.*

ternational Commercial Contracts.¹¹² UNCITRAL promulgated its Model Law on Cross-Border Insolvency (“MLCBI”) in 1997,¹¹³ which loosely resembles the EU Insolvency Directive¹¹⁴ and has been implemented by as many as 46 countries, including the United States and United Kingdom.¹¹⁵ Late in 2018, UNCITRAL also promulgated its Model Law on Recognition and Enforcement of Insolvency Related Judgments (“MLREIRJ”).¹¹⁶ These are certainly not hard international law as Abbott and Snidal would define it.¹¹⁷ In addition, none of these soft laws cover the breadth that a triple PIL treaty would have. The Choice of Law Principles would, if enacted as domestic legislation, govern questions of what law should govern a dispute but say nothing about the jurisdictional reach of the court entering a judgment or the commitment of some receiving court to recognize or enforce that judgment. The Model Laws on insolvency proceedings and insolvency related judgments are silent on which country’s insolvency or other law should govern and mostly silent about questions of jurisdictional reach but nonetheless purport obligations of recognition and enforcement.

Why have international lawmakers turned to soft law in this context, and why have they set their sights so narrowly? What, if any, is the role of business in this turn toward soft law? In analyzing hard and soft international laws on the enforcement of arbitral awards, this Article emphasizes the important effects that these soft laws might have on private parties’ decisions regarding the scope of their arbitration agreements, the conduct of an arbitration proceeding, and their decisionmaking about where (that is, in what state) to bring such a proceeding. In this context, soft laws on commercial arbitration supplemented the New York Convention—that is, the hard international law on these topics.

112. Hague Principles on Choice of Law in International Commercial Contracts, Mar. 19, 2015, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135> [hereinafter Hague Conference Choice of Law Principles].

113. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, U.N. Sales No. E.99.V.3 (1997) [hereinafter MLCBI].

114. For discussion of the resemblance and distinctions between MLCBI and EU Insolvency Directive, see, for example, Jay Lawrence Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L.J. 563, 570–74 (1996).

115. Status: *UNCITRAL Model Law on Cross-Border Insolvency (1997)*, U.N. COMMISSION ON INT’L TRADE L., https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last visited Mar. 24, 2019).

116. UNCITRAL MODEL LAW ON RECOGNITION AND ENFORCEMENT OF INSOLVENCY-RELATED JUDGMENTS (U.N. COMM’N ON INT’L TRADE LAW, 1997), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/interim_mlij.pdf.

117. For example, not only can a national legislature add non-uniform provisions to these model laws when enacting legislation to implement them, both the MLCBI and MLREIRJ depend on national courts for interpretation of their provisions. The Hague Conference Choice of Law Principles are similarly not enforceable obligations. Although entitled “principles” rather than a “model law,” the Choice of Law Principles are framed in language precise enough for domestic enactment, as is, and indeed official commentary to these Principles invites national legislatures to do just this.

Soft laws like the Hague Conference Choice of Law Principles and UNCITRAL's insolvency model laws cannot be viewed as fulfilling a similar gap-filling purpose. None of these soft laws can be viewed as supplementary to a correlative international treaty. The purpose of these stand-alone soft laws is instead to convince domestic legislatures to enact national laws identical to, or at least resembling, their provisions. They fulfill an "advocacy" function by providing draft language that domestic legislatures might enact and also spelling out the arguments in favor of such enactment. In addition to advocacy of these public, sub-national entities, these stand-alone soft laws may also look to convince private, commercial parties to get involved. Private parties can be guided by this soft law when lobbying states to get serious about negotiating a triple PIL commercial treaty, to be sure. But private, commercial actors can also contract and litigate in a way that would encourage a broader range of countries to enact such legislation.

The public and private advocacy functions of these soft laws work together. Although ostensibly the exclusive purpose of the Choice of Law Principles is to promote "party autonomy" regarding contractual choice of law clauses,¹¹⁸ this soft law alone would not bind domestic courts' considerations as to whether to enforce a contractual choice of law clause. As a result, the Hague Principles of Choice of Law may not prompt much contractual private action in the absence of domestic legislation committing to the enforcement of such clauses.¹¹⁹ As a first move, the Principles look to convince national actors to press for such legislation; once that legislation is in place, the Principles would serve as a guide to contracting parties, to litigants, and ultimately to the courts asked to enforce such clauses in the event of a dispute.

A similar advocacy project is implicit with UNCITRAL's insolvency-focused model laws. Its Model Law on Cross-Border Insolvency looked mostly to convince domestic legislatures to enact implementing legislation. Unlike a commercial treaty, which would only enter into force if a specified number of countries accede to its terms, a model law is enforceable with the first country's enactment. The success of the MLCBI and MLREIRJ also depend on convincing private parties to contract and litigate in ways consistent with their terms. In other words, UNCITRAL is betting that its MLCBI and MLREIRJ are "hard enough" to encourage private parties to choose to bring insolvency-related litigation in jurisdictions that have enacted legislation to implement these model laws, but these subject matter areas are narrow, so the learning will be slow.

Not surprisingly, businesses and other private actors were involved in the drafting of these stand-alone soft laws. No empirical study of the Choice

118. Hague Conference Choice of Law Principles, *supra* note 112, intro.; see also Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 873, 878 (2013).

119. See Symeonides, *supra* note 118 (explaining that, in arbitration, both parties must agree on where to arbitrate, but generally plaintiffs choose where to litigate).

of Law Principles exists, but the fingerprints of business actors are relatively clear—not surprisingly, considering the Principles focus exclusively on contractual provisions for choosing a country’s law and private parties have every interest in enhancing the predictability of commercial agreements in this way.¹²⁰ Review of background papers publicly available on the Hague Choice of Law Principles confirms that private actors enjoyed access to the project as observers, although this right of observation cannot be equated with influence on the project in the absence of further qualitative study. Having a seat at the table is only a necessary first step to influence.¹²¹ A list of the members of the working group charged with drafting the Hague Choice of Law Principles includes nineteen members—sixteen of whom were legal academics from around the world, in addition to two judges and one practicing lawyer.¹²² This working group was also aided by six “observers,” four of whom came from international trade associations with interests in the wide enforcement of choice of law clauses.¹²³ Similarly, non-state actors’ involvement in the drafting of UNCITRAL’s MLCBI and MLREIRJ is also clear. Since its inception, UNCITRAL has allowed non-governmental organizations (“NGOs”) to observe its working group sessions, and NGOs such as the International Bar Association, INSOL International, and the International Chamber of Commerce (“ICC”) regularly attend these sessions and, indeed, observations by NGOs have been constant since then.¹²⁴

3. Contracts Concerning Commercial Conduct, and the International Laws Governing Such Contracts

Several longstanding and widely ratified treaties govern the substance of commercial contracts. The Hague Rules and its related Visby Protocol (1924 and 1968) have been ratified by more than one hundred countries and are widely reported to represent more than ninety percent of the world’s

120. For a discussion of the entities likely to rely on the Hague Conference Choice of Law Principles, see Jürgen Basedow, *The Hague Principles on Choice of Law: Their Addressees and Impact*, 22 UNIFORM L. REV. 304 (2017).

121. For an empirical study of attendance at UNCITRAL working group sessions premised similarly on the importance of attendance in influencing international lawmaking, see Terence C. Halliday, Josh Pacewicz, & Susan Block-Lieb, *Who Governs? Delegations and Delegates in Global Trade Lawmaking*, 7 REG. & GOVERNANCE 279 *passim* (2013); BLOCK-LIEB & HALLIDAY, *supra* note 1, at 161–92.

122. See *List of Working Group Members and Observances*, HAGUE CONF. ON PRIV. INT’L L., <https://assets.hcch.net/docs/21d5893d-7f0d-4f4a-84cb-10d28ac643f2.pdf> (last updated Mar. 8, 2010).

123. *Id.* (listing two observers from the International Chamber of Commerce, one from the International Swaps and Derivatives Association and another from the International Bar Association).

124. BLOCK-LIEB & HALLIDAY, *supra* note 1, at 50–91 (discussing the emergence of UNCITRAL and observations by NGOs in first Commission sessions); *id.* at 161–92 (empirically assessing attendance by state and non-state delegations to UNCITRAL across three working groups).

trade volume.¹²⁵ The UN's Convention on the International Sale of Goods (1980) has been ratified by 90 countries.¹²⁶ The UNIDROIT Cape Town Convention on International Interests in Mobile Equipment (2000) has been ratified by 76 countries and the EU. The UNCITRAL Convention on the Use of Electronic Communication in International Contracts has also entered into force but is less widely acceded to than these other conventions (2005); it has been signed or ratified by 22 countries, but only nine countries fully acceded to its terms.

Each of these conventions governs a specific kind of international commercial contract. Except for the Cape Town Convention,¹²⁷ domestic versions of the contracts governed by these conventions are either governed by commercial common law or civil codes on contract law generally. Moreover, the domestic laws that would otherwise govern the contracts now subject to the Cape Town Convention mostly resemble commercial codes, not regulations.¹²⁸ Additionally, all of these conventions (Hague-Visby Rules; CISG; Cape Town Convention) pertain exclusively to transnational contracts of the kind identified in these international agreements: a shipper from country A and carrier from country B (Hague-Visby Rules); a buyer from country A and seller from country B (CISG); a secured creditor claiming an international interest in aircraft collateral or other covered mobile equip-

125. See the Hague Rules, *supra* note 42. For statistics on the status of this treaty and its economic impact, see BLOCK-LIEB & HALLIDAY, *supra* note 1, at 100.

126. See CISG, *supra* note 43.

127. Secured transactions, including the commercial transactions creating international interests in mobile equipment within the scope of the Cape Town Convention, are by and large contractual arrangements between a borrower and lender. These secured transactions laws are not purely contractual, however, in that they purport to bind the borrower's other creditors to the priority claimed by the lender claiming a right to security in such a contract. Often, domestic laws enforce the priority claimed by the lender so long as the contract satisfies various conditions set out in such laws and notice of the security right is made public according to the requirements of such a law. For a more detailed discussion of the combination of contractual and mandatory obligations implicit in secured transactions law, see UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS (2007), U.N. Sales No. E.09.V.12 (2010).

128. U.S. federal law—the Federal Aviation Act—governs transfers of any interest in certain covered aircraft, including financing interests such as a financial lease, conditional title, or other security rights. Federal Aviation Act, 49 U.S.C. §§ 44107–44109 (2012). Article 9 of the Uniform Commercial Code governs other personal property collateral under U.S. law. U.C.C. § 9-109 (AM. LAW INST. & UNIF. LAW COMM'N 2010). Other codes based on article 9, like the Personal Property Security Acts adopted in Canada, New Zealand, and Australia, or codes enacted in civil law jurisdictions to govern security rights or contract law more generally similarly govern personal property collateral of various sorts. See, e.g., Anthony Duggan & Michael Gedy, *Personal Property Security Law Reform in Australia and New Zealand: The Impetus for Change*, 27 PA. ST. INT'L L. REV. 655, 656 (2009) (tracing the reform of Australian secured transactions laws as relates to earlier similar laws in New Zealand, Canada, and the United States).

ment and extending credit on the basis of this collateral to a borrower from country B (Cape Town Convention).¹²⁹

As with international conventions on matters of procedure, some of this hard international law has also been supplemented with soft international law, although the combination of hard and soft international law is not uniform across all these subject matter areas.¹³⁰ For example, UNCITRAL's Convention on the International Sales of Goods has been "supplemented" by UNIDROIT's Principles on International Commercial Contracts.¹³¹

The previous sections demonstrate that soft international laws supplemented treaties on enforcement of litigation and arbitral awards for different reasons.¹³² The New York Convention is surrounded by supplementary, gap-filling soft law that has become incrementally harder. The Hague Conference's Choice of Law Principles were promulgated because working group participants viewed the prospect of hard law on the topic to be unlikely in the short-to-medium term; the working group expressed its hope that this soft law text would convince domestic legislatures to enact national laws modeled on the Principles and direct enforcement of choice of law clauses.¹³³

UNIDROIT's International Commercial Contract Principles ("ICC Principles") fulfill both gap-filling and advocacy soft law purposes. The Introduction to the ICC Principles describes them as providing a "non-legislative means of the unification or harmonization of law" intended to resemble the American Law Institute Restatement projects.¹³⁴ The ICC Prin-

129. See *supra* text accompanying nn. 67–68.

130. For example, the breadth of the Cape Town Convention has expanded since it first entered into effect in 2000. Rather than accomplish this expansion through gap-filling soft laws, UNIDROIT instead relied on a hub-and-spoke mechanism that links protocols governing narrow sorts of mobile equipment types—such as aircraft, rail and rolling stock, spacecraft and satellites, and mining and agricultural equipment—with the general provisions contained in the Cape Town Convention. For a discussion of this "hub-and-spoke" approach to the Cape Town Convention, see, e.g., Goode, *supra* note 68, *passim*; Jeffrey Wool, *The Next Generation of International Aviation Finance Law: An Overview of the Proposed UNIDROIT Convention on International Interests in Mobile Equipment as Applied to Aircraft Equipment*, 20 U. PA. J. INT'L ECON. L. 499, 509–10 (1999). For a discussion of business interests in promoting the design of the Cape Town Convention, see Durkee, *supra* note 2, at 292–97.

131. PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, 2016). UNIDROIT's Principles were issued in 1994 and have been supplemented over time (2000, 2010, 2016). For other examples of soft law in the interstice of international commercial treaties, see U.N. Conference on Trade and Development, *UNCTAD/ICC Rules for Multimodal Transport Documents*, U.N. Doc. TRADE/WP.4/INF.117/Corr.1 (Jan. 7, 1992).

132. Compare text associated with *supra* nn. 75–94 (discussing the gap-filling function of soft law in the context of enforcement of arbitral awards), with text associated with *supra* nn. 95–125 (discussing the advocacy function of soft law on the enforcement and recognition of judgments).

133. Convention on Choice of Court Agreements, pmbl., June 30, 2005, 44 I.L.M. 1294; see also Symeonides, *supra* note 118.

134. PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS at vii.

ciples make clear that UNIDROIT directs this text, in true soft law fashion, to a wide range of national lawmakers, such as legislators and courts, so that they might implement its recommendations in their domestic law (whether common law or civil codes) and practices.¹³⁵ The ICC Principles are also directed to private parties, whether those litigating before national courts or drafting various clauses for inclusion in their international contracts.¹³⁶ To clarify this message to contracting parties, UNIDROIT also couples its ICC Principles with standardized contract clauses for parties' use.¹³⁷

Although the ICC Principles are directed both toward public and private actors, private actors were mostly involved in the drafting. The working groups involved in drafting these Principles included academics, practitioners, and judges.¹³⁸ Perhaps more tellingly, the ICC Principles were drafted by experts and ratified by UNIDROIT's governing council but did not receive formal approval from UNIDROIT's member states.¹³⁹ UNIDROIT's approach to the ICC Principles—that is, its failure to seek formal approval from member states—resembles that followed in its Principles of Reinsurance Contracts¹⁴⁰ but is distinct from that of its other soft law projects, such as UNIDROIT's Principles on the Operation of Close-Out Netting Provisions, which were prepared by a working group, approved by the governing council, and subsequently ratified by creating a group of “governmental experts.”¹⁴¹ States' involvement in the drafting of the Close-Out Netting Prin-

135. *Id.* at pmb1. (“These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law. They may be used to interpret or supplement international uniform law instruments. They may serve as a model for national and international legislators.”).

136. *Id.*

137. *Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts*, INT'L INST. FOR UNIFICATION PRIV. L., <https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses> (last updated Jan. 30, 2017).

138. *See, e.g.*, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS at xiii–xiv.

139. *Id.* Although their motivation in drafting the ICC Principles in this way is not perfectly clear, UNIDROIT might have been motivated by UNCITRAL's experience in drafting its Arbitration Rules, which also were originally promulgated without the political imprimatur of member states. *See supra* nn. 92–94.

140. The UNIDROIT Principles of Reinsurance Contracts are incomplete, although it expects this work to be finished by 2019. For discussion of the purpose and working methods followed in preparing the Reinsurance Principles, see *Study L – Formulation of Principles of Reinsurance Contracts*, INT'L INST. FOR UNIFICATION PRIV. L., <https://www.unidroit.org/work-in-progress/reinsurance-contracts> (last updated May 8, 2018).

141. *See Principles on the Operation of Close-Out Netting Provisions*, INT'L INST. FOR UNIFICATION PRIV. L., <https://www.unidroit.org/instruments/capital-markets/netting> (last updated Dec. 11, 2013). For detail on UNIDROIT's preparatory work preceding its Governing Council's ratification of the Close-Out Netting Principles, see *Study LXXVIII C – UNIDROIT Principles on the Operation of Close-Out Netting Provisions – Preparatory Work*, INT'L INST.

ciples may be the result of the market-wide public interest in the enforcement of these financial contracts, confirmed perhaps by UNIDROIT's multiple texts on this and related subjects.¹⁴²

4. Regulation of Commercial Conduct, and International Laws on Such Regulation

National commercial regulation has expanded to address a wider range of issues over the course of the twentieth and now twenty-first centuries, including consumer protection regulation, environmental regulation, intellectual property regimes, and regulation of securities and other financial markets. As a result, international actors face increasing pressures to enter into international agreements on some of the topics subject to these regulations.¹⁴³ Treaties on regulatory issues present greater sovereignty concerns than those concerning contracts and other voluntary agreements. As argued above, international agreement on commercial regulation treads on the sovereignty interests of countries in three ways: the authority of domestic legislatures to enact regulation; the authority of executive branches to design, implement, and enforce such regulation; and the competence of courts to interpret and enforce these laws.¹⁴⁴ International commercial regulation of this sort would stomp fully on states' sovereign feet, not just a toe here and there.

As might be expected, conventions—hard international laws—on commercial regulation are relatively rare and mostly govern purely international transactions. Hard international commercial regulation is thus both rare and limited in scope. Yet, increasingly, global lawmakers (and other international organizations focused on law as the solution to problems of transnational scale) have proposed international law projects aimed at changing commercial and other local behaviors; have proposed international regulation to accomplish such changes; and have focused their international calls for reform at the substance of domestic legislation.

This increased demand for commercial and financial law reform is the consequence of several epochal events beginning in the last decades of the twentieth century. First, the fall of the Berlin Wall and subsequent demise of the Soviet Union meant that a dozen or so former Soviet satellite countries

FOR UNIFICATION PRIV. L., <https://www.unidroit.org/netting-preparatory-work> (describing the work of the “study group” and “committee of governmental experts”) (last updated July 15, 2014).

142. UNIDROIT Convention on Substantive Rules for Intermediated Securities, Oct. 9, 2009, <https://www.unidroit.org/english/conventions/2009intermediatedsecurities/convention.pdf>; *see also* UNIDROIT LEGISLATIVE GUIDE ON INTERMEDIATED SECURITIES (2017), <https://www.unidroit.org/instruments/capital-markets/legislative-guide>.

143. For discussion of these pressures, *see* THE CHANGING LANDSCAPE OF GLOBAL FINANCIAL GOVERNANCE AND THE ROLE OF SOFT LAW, *supra* note 35; Delimatsis, *supra* note 33, at 286–87.

144. *See supra* Section III.A.

needed to rewrite their civil codes and other legislation to allow for private ownership of property and transfers of such ownership, contracting, the formation of corporations and other legal persons, regulation of banks and capital markets, and so on. These reform initiatives were mostly concentrated regionally and assisted by acceptance of most of these countries into the European Union.

Proposals for international regulation also proliferated, second, as a consequence of the two past global financial crises. Clubs of nations, international financial institutions, and other international organizations first reacted to the Asian financial crisis with proposals to raise the level of the global financial architecture.¹⁴⁵ The G-22 promoted its global financial architecture project as a means of preventing future financial crises.¹⁴⁶ In a series of reports published in 1999, the G-22 proposed that its “member” countries—the twenty-two systemically significant economies of the world—should reform a lengthy list of financial and economic regulations, including: banking regulation; capital markets regulations; regulations of securities and related financial laws; accounting standards; standards for corporate insolvency laws; and so on.¹⁴⁷ The global financial architecture project impelled numerous IOs, including several global lawmakers, to engage in designing and promulgating international commercial and financial law reforms. By 2009, when ahistorical levels of default in subprime mortgage markets in the United States began to unravel and undermine financial markets more broadly, the financial architecture project was nowhere near complete. However, it grew in importance. The G-8 and G-20 circled back to the need for strengthening the global financial architecture as a means of tempering the worst effects of the emerging global financial crisis.¹⁴⁸ The list of financial and commercial regulation that these clubs of nations proposed to internationalize was lengthened, which meant that the list of commercial and financial actors’ behaviors that should be examined and potentially changed also grew longer.

Both monumental shifts in the global political economy prompted demand for reform of international laws governing private, commercial conduct as well as internationally-coordinated reform of national laws governing commercial and financial markets. To be clear, this was more than simply an increase in the quantity of international law reform proposals. These were also qualitatively distinct proposals: to “make,” not simply “find,” commercial laws to govern existing commercial practices; to craft mandatory rules and mandates that would alter commercial conduct; and for at least some of this law to be reformed simultaneously as applied both to international and purely domestic commercial transactions.

145. HALLIDAY & CARRUTHERS, *supra* note 16; BLOCK-LIEB & HALLIDAY, *supra* note 1, at 121–25.

146. BLOCK-LIEB & HALLIDAY, *supra* note 1, at 122.

147. See Block-Lieb, *supra* note 55.

148. Cho & Kelly, *supra* note 55, at 493.

In implementing these proposals on commercial and financial regulation, global lawmakers have mostly relied on soft international law. For example, UNCITRAL's work on setting standards for corporate insolvency laws has resulted in the production of more than a handful of soft law texts: two draft model laws, a legislative guide with several parts published over multiple years, and one practice guide.¹⁴⁹ Suggestions for a multilateral treaty on cross-border insolvency practice have mostly been rebuffed.¹⁵⁰ UNCITRAL's work on secured transactions law reforms also involves only soft law instruments.¹⁵¹ In addition, UNCITRAL is not alone in drafting international regulations as soft laws. The Financial Stability Board ("FSB"), working on its own or partnering with the Organization for Economic Cooperation and Development ("OECD"), has promulgated reports, high-level principles, and other soft law texts on a wide range of financial topics. Various transnational regulatory networks and international professional associations have furthered the work of the FSB and the OECD by publishing related supplementary texts on these issues. Over time, the G-20 has endorsed dozens of these high-level principles.¹⁵² As a result, a wide range of soft international laws now exists in these contexts, including corporate governance,¹⁵³ regulation of the securities and capital markets,¹⁵⁴ and the financial institutions engaged in these markets.¹⁵⁵

149. See e.g., UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, *supra* note 72; UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW: PART THREE: TREATMENT OF ENTERPRISE GROUPS IN INSOLVENCY, *supra* note 72; UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW: PART FOUR: DIRECTORS' OBLIGATIONS IN THE PERIOD APPROACHING INSOLVENCY, *supra* note 72.

150. UN Commission on Int'l Trade Law, Rep. of Working Group V (Insolvency Law) on Its Forty-Fifth Session, ¶ 39, U.N. Doc. A/CN.9/803 (May 6, 2014).

151. See e.g., UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS, *supra* note 127; UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments Adopted (2006), *supra* note 77.

152. See e.g., G20 HIGH-LEVEL PRINCIPLES FOR DIGITAL FINANCIAL INCLUSION (2016), <https://www.gpfi.org/sites/default/files/documents/G20%20High%20Level%20Principles%20for%20Digital%20Financial%20Inclusion%20-%20Full%20version-.pdf>.

153. For a discussion of the wide range of soft international law on topics of corporate governance, see, for example, Klaus J. Haupt, *Comparative Corporate Governance: The State of the Art and International Regulation*, (ECGI Working Paper Series in Law, Law Working Paper No. 170/2011, 2011); Dimity Kingsford Smith, *Governing the Corporation: The Role of 'Soft Regulation'*, 35 U.N.S.W. L.J. 378 (2012); VERONIQUE MAGNIER, *COMPARATIVE CORPORATE GOVERNANCE: LEGAL PERSPECTIVES passim* (2017). For a comparative discussion of national perspectives on corporate governance, see, for example, Martin Gelter, *Comparative Corporate Governance: New and Old*, in UNDERSTANDING THE COMPANY: CORPORATE GOVERNANCE AND THEORY 37 (Barnali Choudhury & Martin Petrin eds., 2017).

154. For a discussion of the emergence and complications involving soft international laws on the regulation of securities markets, see, for example, Chris Brummer, *Post-American Securities Regulation*, 98 CALIF. L. REV. 327 (2010); Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOK. J. INT'L L. 883 (2009). For a comparison of national laws on securities regulation, see, for example, GLOBAL SECURITIES LITIGATION AND ENFORCEMENT (Pierre-Henri Conac & Martin Gelter eds., 2018).

Why has UNCITRAL promulgated only soft international law on corporate insolvency law standards? Do UNCITRAL's goals for the production of soft law regarding regulation governing insolvency proceedings differ from the goals of the G-20 in promoting its global architecture project?

UNCITRAL describes its initial Legislative Guide on Insolvency Law and the multiple supplements to this Guide as the end of the road as far as international lawmaking goes; it has not proposed engaging in further work in the area, for example, by drafting a model law on the substantive corporate insolvency law.¹⁵⁶ However, this does not mean that the Insolvency Guide should not be viewed as advocating legislative enactment. Similar to what the Hague Conference revealed in its publication of Choice of Law Principles, UNCITRAL aims to speak directly to domestic legislatures and to persuade them to enact domestic insolvency laws resembling the contents of its Legislative Guide on Insolvency Law.

The G-20 has a different goal in mind. Through this international economic forum, the most economically powerful nations work together to influence networks of transaction regulators so that their actions (whether regulatory or enforcement conduct) converge with those set out in various high-level principles.¹⁵⁷ Domestic legislation is beside the point. As Chris Brummer argues, no one national regulator can be expected to “single-handedly impose its will globally on all actors, all the time, and on its own” given the increasingly globalized financial markets subject to such regulation.¹⁵⁸ As a result, he argues, international decisionmaking became a “‘vertically’ integrated regulatory system.”¹⁵⁹ It has soft laws “serving as a building block and focal point for coordination” that assist in creating “patterns of relationships” among heads of states, national regulatory agencies, international financial institutions, inter-governmental organizations, and non-

155. For a discussion of transnational regulatory networks of financial regulators and the soft laws they have promulgated and implemented, see INTERNATIONAL INVESTMENT LAW AND SOFT LAW, *supra* note 35; BRUMMER, *supra* note 35; Chris Brummer, *Why Soft Law Dominates International Finance—and not Trade*, 13 J. INT'L ECON. L. 623 (2011); Weiss and Kammel, *supra* note 35; Hissane Cissé, *Alternatives to “Hard” Law in International Financial Regulation: The Experience of the World Bank*, 106 ASIL PROCEEDINGS 320 (2012).

156. UNCITRAL prepared three model laws on the topic of insolvency, but all of these are procedural. See UNCITRAL MODEL LAW ON RECOGNITION AND ENFORCEMENT OF INSOLVENCY-RELATED JUDGMENTS (U.N. COMM'N ON INT'L TRADE LAW, 1997), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/interim_mlij.pdf; MLCBI, *supra* note 113; see also John A. E. Pottow, *The Dialogic Aspect of Soft Law in International Insolvency: Discord, Digression, and Development*, 40 MICH. J. INT'L L. 479 (2019). In this way, UNCITRAL's Legislative Guide on Insolvency Law should be distinguished from its Legislative Guide on Secured Transactions, see *supra* note 127, which has subsequently been followed by a Model Law on Secured Transactions. UNCITRAL MODEL LAW ON SECURED TRANSACTIONS (U.N. COMM'N ON INT'L TRADE LAW, 2016).

157. See, e.g., BRUMMER, *supra* note 35, at 73 (discussing the G-20 and the “range of legislative products” they put out, “including communiques and declarations”).

158. BRUMMER, *supra* note 35, at 61.

159. *Id.* at 115.

state organizations.¹⁶⁰ Soft laws work in this context—they affect and even alter behaviors in complex financial markets—because they offer opportunities for “socializing” transnational networks of actors and thus institutionalizing their conduct and practices.¹⁶¹

Distinct from gap-filling soft laws like UNCITRAL’s Arbitration Rules and Model Law on Commercial Arbitration and UNIDROIT’s ICC Principles, and distinct from the soft law advocacy implicit in the Hague Conference’s Choice of Law Principles, the G-20’s high-level principles and UNCITRAL’s Legislative Guide are, thus, intended to prompt dialogue among international, national, and local actors. Open-ended recommendations or high-level principles drafted by IOs such as UNCITRAL or the FSB produce a sort of “check list” that invites review of country practices by national actors.¹⁶² To some extent, this check list intends to be diagnostic, though it prompts self-diagnosis rather than the more “top-down” judgment that may engender sovereign nations, whether powerful or weak, to bridle at the intrusion.¹⁶³

The influence of business actors and associations on the drafting of corporate insolvency law standards and in the drafting and implementation of this soft international law on regulated financial markets and transactions is now well-established. Halliday and I observed UNCITRAL’s work on the Insolvency Guide in real time and over many years.¹⁶⁴ We found considerable involvement in that process by a range of international professional associations, including the International Bar Association, American Bar Asso-

160. *Id.* at 116.

161. *See, e.g.*, TRANSNATIONAL LEGAL ORDERS, *supra* note 16, at 19 (describing “networks” of “regulators, businesses, and civil society actors” participating “in social contexts beyond the nation-state” and noting that “[p]articipants in these networks act as intermediaries among local, national, and transnational governance arenas.”) (citation omitted). This “socializing” may well assist in the institutionalization of TLOs. *See id.* at 51 (defining “institutionalization” as occurring “when relevant actors clearly understand which norms apply in what situations and which behaviors will be considered in conformity with those norms.”).

162. For a discussion of the working methods of the Financial Stability Board, *see*, for example, Michael S. Barr, *Who’s In Charge of Global Finance?*, 45 GEO. J. INT’L L. 971, 1004 (2014) (“The principal mechanism by which a level playing field and intergovernmental accountability are achieved is peer review—a process that ‘produces social pressures, which in turn shapes judgments as to whether or not to conform to a given standard.’”).

163. Other soft law texts, like those promulgated by the World Bank or the regional development banks, are sometimes framed as “diagnostic” aids to assist Bank staff in conducting country reviews or to aid domestic ministries of justice in drafting national legislation. For a guide to the contents of such texts, *see* JOSÉ GUILHERME REIS & THOMAS FAROLE, TRADE COMPETITIVENESS DIAGNOSTIC TOOLKIT (2012). These diagnostic tools directly provide a sort of check list for staff working on behalf of these international financial institutions (“IFIs”), but, because these diagnostic tools are made publicly available, states, too, can access the check lists in an effort to excel when diagnostic work subsequently gets done by IFI staff.

164. BLOCK-LIEB & HALLIDAY, *supra* note 1, at 1.

ciation, INSOL International, and International Insolvency Institute,¹⁶⁵ although no trade groups.¹⁶⁶ This access by professional associations is distinct from capture in that we also observed a strong Secretariat at UNCITRAL that repeatedly protected member and observer state delegations from conduct by non-state actors that crossed the line.¹⁶⁷ Indeed, state delegations were aware of the close working relationship between members of the Secretariat and delegates in various non-state delegations. When France raised objections to UNCITRAL regarding these “methods of work,” member states ultimately reaffirmed their support for the assistance that these “experts” provided to the international civil servants.¹⁶⁸

Halliday and I have not observed the workings of the FSB or OECD, on the other hand, and there is limited empirical study of these “black boxes.”¹⁶⁹ Nonetheless, several general observations are worth making in this context. Because the substance of this soft international law involves commercial and financial practices that are regulated at the national level or are in some sense subject to mandatory legislation, we should presume that businesses have already sought to influence this regulation at the national level through lobbying and related activities. As noted above, international lawmaking may provide businesses with a “second bite at the regulated apple” and, depending on the market interests at stake with this sort of international regulation, may prompt businesses’ efforts to seek to reverse the effects of national regulation.¹⁷⁰ But self-regulatory organizations have not

165. *Id.* at 187 (noting that “professionals played outsized roles in the inner core of lawmakers [within UNCITRAL]. Delegations of professionals (International Bar Association, INSOL International, American Bar Association, International Insolvency Institute) to the Insolvency Working Group were arguably the critical technical drivers of that deliberative process.”).

166. For a discussion of the absence of business or financial actors or associations—despite the presence of their proxies in the form of insolvency professionals (that is, international organizations of such professionals), see Terence Halliday, Susan Block-Lieb, & Bruce Carruthers, *Missing Debtors: National Lawmaking and Global Norm-Making of Corporate Bankruptcy Regimes*, in *A DEBTOR WORLD* 236 (Ralph Brubaker et al. eds., 2012).

167. BLOCK-LIEB & HALLIDAY, *supra* note 1, at 204 (“All working group secretaries and most participants contest the characterization of an ‘expert group as a smoke-filled room.’”).

168. BLOCK-LIEB & HALLIDAY, *supra* note 1, at ch. 8.

169. For a tentative study of the global financial architecture project, see FIN. STABILITY BD., IMPLEMENTATION AND EFFECTS OF THE G20 FINANCIAL REGULATORY REFORMS: 28 NOV. 2014 4TH ANNUAL REPORT (2018), <http://www.fsb.org/wp-content/uploads/P281118-1.pdf>.

170. *Cf.* Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201, 204 (2017) (arguing that “businesses are able to secretly gain access to international officials” because rules of international access to IOs are unsophisticated and in need of reform); Shaffer & Pollack, *supra* note 9, at 765–84 (describing soft law produced in the context of powerful states that agree on a common policy, powerful states that disagree, and weak states that disagree, finding complementary soft law strategies in the case of agreement between powerful states but antagonistic strategies in other cases; adding businesses’ interests to the mix only heightens the likelihood of such antagonism).

drafted these soft laws alone; organizations of numerous sub-state actors, such as national regulators, have joined with inter-governmental organizations to reach consensus through a procedure described as “socializing” along a “vertically-integrated regulatory system.”¹⁷¹ It is hard to imagine capture by business actors of such a diffuse network of actors, but, of course, it is difficult to observe hundreds of “black boxes” and that may be precisely the goal of such fragmentation.

C. A Return to the Big Picture

Soft laws play important roles in the development of international commercial law—some complementary and some antagonistic. Rather than simply focusing on interactions between hard and soft international laws, or on consensus or dissensus among states’ interests in such laws, this Article looked at the involvement and influence of business interests in the making of international commercial law and particularly at the role soft laws play in this context.

In the realm of international commercial and financial law, soft laws play at least three distinct roles: gap-filling, advocacy, and socializing. Identification of these roles is not itself novel,¹⁷² but discussion of them through the lens of business influence’s impact on these functions does lend a distinct perspective. Although we may discuss these functions without reference to businesses’ access to international efforts to craft agreed-upon standards for conduct in global commercial and financial markets, this discussion would ignore an important reality: Just as “business entities have become deeply involved in designing, negotiating, and implementing a number of *treaties* in the private law,”¹⁷³ they are also embedded in designing, negotiating, and implementing the *soft law* governing international commercial law.¹⁷⁴ Private, commercial actors’ involvement is not limited, moreover, to the process of global lawmaking itself; businesses and the professionals, professional associations, and IOs that represent their interests are also engaged, after the fact, both in terms of incremental work to “harden” these soft standards in subsequent rounds of lawmaking and in implementing these standards with practices “on the ground.” Although sovereign states might be expected to focus on the absence of obligation in soft international law, regardless of its function, autonomous, non-state actors are more likely to emphasize soft laws’ effectiveness in coordinating activity, its flexibility in the face of changing markets, technology and the resulting

171. BRUMMER, *supra* note 35, at 115 (“Broad-based and more-political institutions set agendas and assess gaps, whereas more-technocratic sectoral and specialist standards setters promulgate best practices and, in some instances, granularized rules.”).

172. See, e.g., Shaffer & Pollack, *supra* note 9, at 722–27.

173. Durkee, *supra* note 2, at 266 (emphasis added).

174. See *supra* Part III.

political economy, and the legitimacy it provides in validating otherwise purely private action.¹⁷⁵

When businesses seek to influence the adoption and implementation of gap-filling soft international laws, they bring their distinct capabilities to the table. *Gap-filling* soft laws are understood to extend the subject matter reach of pre-existing hard law instruments with reference to topics implicated in a treaty but left unsaid. The drafting of gap-filling soft laws involves the drafting of more precise detail and information that got left out of the treaty in order to ensure international agreement on an enforceable obligation. To emphasize gap-filling soft laws merely as producing greater detail in the international commercial law on a topic is to focus solely on the implementation of this form of soft law through the subsequent production of some harder sort of international law. Yet businesses hold a distinct edge in the implementation of gap-fillers in that this sort of soft law often is relied on by private parties in constructing their contracts and possibly also in standardized networks of contracts. UNCITRAL's Arbitration Rules, for example, set unenforceable standards for the conduct of arbitration proceedings. This guidance may thereafter become enforceable when the contents of the Rules are incorporated into arbitration clauses in private contracts. The contracts themselves are enforceable under national laws of general application, while the arbitral awards that result from the arbitration proceedings committed to in such contracts are themselves likely to be enforced as a result of the New York Convention.

Private actors' involvement and influence also affect the implementation of soft law intended to prompt *socializing* an area of financial regulatory law.¹⁷⁶ To be sure, soft laws on the conduct of central banking practices will mostly be socialized by public actors charged with regulating these functions under national laws.¹⁷⁷ But, to a varying degree across national regulatory landscapes, private actors' involvement may well be critical to the success of the socializing of the global standards set out in soft international law, especially where central banking functions are held by private banks or where self-regulation governs financial markets. Public and private actors coordinate their interactions through IOs with "highly developed"

175. For a more general discussion of the interaction of public and private incentives in international lawmaking, see Jürgen Basedow, *The State's Private Law and the Economy Commercial Law as an Amalgam of Public and Private Rule-Making*, 56 AM. J. COMP. L. 703, 719 (2008) (looking to "identify the conditions that favor the emergence of private rules as well as those that make state law indispensable.").

176. For a discussion of the concept of "modeling" and the interaction of epistemic communities of like-minded actors, see BRAITHWAITE & DRAHOS, *supra* note 19, at 539; see also Shaffer & Pollack, *supra* note 9, at 726 (discussing the importance of Braithwaite and Drahos to understanding the complementary relationship between hard and soft international law and regulation).

177. Barr, *supra* note 162, at 992 (detailing the working methods of the Financial Stability Board as involving both development of independent reports and "ensuring global compliance" in part through "peer reviews on a country-by-country and regional basis").

governance structures.¹⁷⁸ Together the “vertically-integrated regulatory system” that Brummer likens the global financial architecture project to may work on three distinct levels, as suggested by Transnational Legal Order theory:¹⁷⁹ it may vertically link international and transnational organizations not only to national regulators but also commercial and financial entities “on the ground.”¹⁸⁰ While socializing soft laws may interact with existing, or lead toward eventual, hard international laws, they need not. Where the socializing occurs among tightly bound epistemic communities of actors, there is little need for the formal obligations that hard law would bring. Their commonalties converge action toward a singular goal despite the absence of a credible threat of enforcement.

Finally, soft laws aimed at *advocating* the need for further international or national laws on a topic may also rely on a combination of public and private action. The Hague Conference promulgated its Choice of Law Principles as soft law and not as a draft treaty because preliminary work on the topic convinced the Conference that the time was not ripe for such a convention. It also promulgated the Principles because, notwithstanding this lack of state interest in pursuing the topic, private parties and organizations representing various business interests persisted in the commercial benefits of predictable enforcement of contract clauses choosing the applicable governing law. This divergence between states’ sovereign and businesses’ autonomous interests were negotiated through the soft law format.¹⁸¹

178. BRUMMER, *supra* note 35, at 116 (“Despite their soft law foundations, the standard-setting bodies that drive standard setting and international agendas typically possess highly developed institutional structures, each with its own mix of membership rules, decision rules, and decision-making processes.”).

179. For a discussion of the international, national, and local coordination and concordance envisioned by TLO theory, see TRANSNATIONAL LEGAL ORDERS, *supra* note 16, at 42–48.

180. See, e.g., Eric Helleiner, *Regulating the Regulators: The Emergence and Limits of the Transnational Financial Legal Order*, in TRANSNATIONAL LEGAL ORDERS, *supra* note 16, at 231–57, 249 (“Major shifts in the content of regulation in the period – including the new emphasis on ‘macroprudential’ regulatory philosophy – can be attributed in large part to new ideas and consensus formation among experts in transgovernmental networks, many of which have become more skeptical of neo-liberal ideas in finance, as well as of transnational private lobbying.”) (citation omitted); Carola Westermeier, *The Bank of International Settlements as a Think Tank for Financial Policy-Making*, 37 POL’Y & SOC’Y 170, 183 (2018) (analyzing the Bank of International Settlements both “as a host to central bankers, financial politicians and other actors in financial governance and as a provider of knowledge to these networks”).

181. Advocacy through soft law can be both positive (pressing for the subsequent adoption of some harder international law) and negative (making the case for revisions to or reversals from existing international law instruments). For examples and analysis of antagonistic soft international laws, see Shaffer & Pollack, *supra* note 9, at 788–98.

CONCLUSION

Empirical research increasingly demonstrates that businesses' influence on international commercial law may involve more than simply pressing the State Department or a foreign ministry to pursue their interests in international negotiations. In the wake of these findings, this Article sought to "update" theoretical understanding regarding the primacy of states' involvement in the making and implementation of international law by focusing on one sort of international law—specifically, international commercial law. The Article explored the role that businesses and other private actors play in the construction and implementation of these international texts. In theorizing about private, commercial actors' roles in these processes, it emphasized and compared the distinct interests and abilities of public and private actors in the choice between hard and soft international law.

The conventional way to conceive of business access in the lawmaking context is as lobbying or legislative influence. With this depiction, domestic businesses press the state in which they reside to design international agreements on topics of commercial law consistent with their commercial interests. But, while commercial actors may well look to influence global lawmaking in this way, indirectly through the portal of state action, studies show that businesses also make their transnational commercial interests known more directly to global lawmakers. That businesses exercise their influence in both national and international settings suggests that hard and soft international laws can serve a distinct purpose for states than for businesses, depending on the type of international commercial law at issue. It also suggests that the decision to promulgate soft or hard international commercial laws may not depend exclusively on state-centric factors or on commercial interests filtered through a state's perception of its national interests.

Although international law is conventionally divided between public and private, between procedural and substantive, this Article described commercial law as falling into a three-part typology: (i) judicial enforcement of private contracts, judgments, or arbitral awards; (ii) "bottom up" legislative codification of commercial practices; and (iii) "top down" regulation of commerce. When viewed this way, the role of business in influencing the production of international commercial law should not be limited to consideration of activities that resemble lobbying. This sort of influence pertains to legislative or regulatory proposals, but not all commercial law is regulatory in format. Businesses may exert influence through contracts, including networks of standardized contracts, and through their dispute resolution practices, including transnational litigation. These additional forms of business influence on commercial law deserve distinct consideration.

This Article identified three purposes of soft international commercial law: gap-filling; advocacy, and socializing functions. It linked soft law's gap-filling function to international laws that resemble common law or code approaches in domestic commercial law. Its socializing function, by con-

trast, was applied predominantly to regulatory commercial law contexts in that soft law can guide TRNs of regulators and civil society toward consensus on a desired range of administrative practices. Soft law advocacy looks not only to plan for subsequent lawmaking within international organizations but also at national and local decisionmaking: domestic legislators, domestic courts, and others involved in the design and conduct of dispute resolution mechanisms.

States may object less to the influence of private interests in the context of soft international commercial law than hard law. Soft international law may look redundant or harmless because it is not “legalized” according to Abbott and Snidal. Yet, perhaps states should be warier of business interests’ access to the making of soft international laws, although soft laws lack legalization. Resolution of the divergences between state and non-state interests by means of soft law channels may obscure business influence, making it harder to detect, and that may be the point.

